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In the Supreme Court of the United States

OCTOBER TERM, 1979

PATRICIA R. HARRIS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, APPELLANT

v.

CHARLES EDWARD WILSON, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

JURISDICTIONAL STATEMENT

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No.

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v.

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JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the district court (App. A, *infra*, 1a-20a) is reported at 478 F. Supp. 1046.

JURISDICTION

The order of the district court (App. A, *infra*, 1a-20a) was entered on October 12, 1979. A notice of

appeal was filed on November 8, 1979 (App. C, *infra*, 24a-25a).[1] On December 28, 1979, Mr. Justice Stevens extended the time for docketing the appeal to and including March 7, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1252. *Weinberger* v. *Salfi*, 422 U.S. 749, 763 n. 8 (1975); *McLucas* v. *De Champlain*, 421 U.S. 21, 31-32 (1975).

QUESTION PRESENTED

Whether Section 1611(e)(1)(A)-(B) of the Social Security Act violates the Due Process Clause of the Fifth Amendment by excluding from eligibility for Supplemental Security Income public assistance benefits otherwise eligible individuals between the ages of 21 and 65 who are residents of public mental institutions.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the Constitution provides in pertinent part:

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[1] The judgment of the district court (App. B, *infra*, 21a-23a) was entered on December 19, 1979, after the filing of the Secretary's notice of appeal from the district court's order. The filing of the notice of appeal was authorized by 28 U.S.C. 1252, which provides for direct appeal to this Court from "an interlocutory or final judgment, decree or *order* of any court of the United States * * * holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party" (emphasis added). Cf. Fed. R. App. P. 4(a)(2) ("* * * a notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after such entry and on the day thereof.").

> No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.

2. Section 1611 of the Social Security Act, 42 U.S.C. 1382, and Section 1905 of the Act, 42 U.S.C. 1396d, are set forth in pertinent part in Appendix D, *infra*, 26a-28a.

STATEMENT

1. Title XIX of the Social Security Act, as amended, 42 U.S.C. 1396 *et seq.*, establishes a medical assistance program, commonly known as "Medicaid," under which the federal government provides financial assistance to those states that choose to reimburse the costs of medical treatment for needy persons. See *Beal* v. *Doe*, 432 U.S. 438, 440-441 (1977).[2] Medicaid benefits generally cover the costs of inpatient and outpatient treatment for both physical and mental illness. Section 1905(a) of the Act, however, specifically excludes from coverage under the Medicaid program services provided to individuals between the

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[2] The Medicaid program identifies two groups of needy persons, the "categorically needy" (including families with dependent children and the aged, blind and disabled eligible for benefits under the Supplemental Security Income (SSI) program, 42 U.S.C. 1381 *et seq.*), and the "medically needy" (including persons who would be eligible for AFDC or SSI payments if they did not have income or resources in excess of the statutory standards and who have insufficient income and resources to pay for necessary medical care). Participating states are not required to extend Medicaid coverage to the "medically needy." See 42 U.S.C. 1396a(a)(10)(A), (C); *Beal* v. *Doe*, *supra*, 432 U.S. at 440 n.1.

ages of 21 and 65 in an institution for tuberculosis or mental diseases. 42 U.S.C. 1396d(a)(1), (4)(A), (14), (15), (16).

Title XVI of the Act, 42 U.S.C. 1381 *et seq.*, establishes the Supplemental Security Income (SSI) program, which provides monthly federal cash assistance to needy aged, blind and disabled persons.[3] Section 1611(e) of the Act provides that no person shall be eligible for SSI benefits in any month "if throughout such month he is an inmate of a public institution."[4] The Act, however, provides a limited exception to this exclusion. An otherwise eligible individual in a public health care facility that is receiving Medicaid payments on his account is entitled to receive SSI benefits of up to $25 per month. 42 U.S.C. 1382(e)(1)(B). Because of their exclusion from coverage under the Medicaid program, persons between 21 and 65 years of age in public mental institutions are not eligible to receive SSI benefits.

2. Appellees are patients in public mental institutions between the ages of 21 and 65 who have been denied SSI benefits. In December 1973, they filed

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[3] SSI was enacted to replace several federal-state grant programs with a uniform federal minimum assistance grant administered by the Secretary of Health, Education, and Welfare. See *Califano* v. *Torres*, 435 U.S. 1, 2 (1978); *Wilson* v. *Edelman*, 542 F.2d 1260, 1267-1268 n.15 (7th Cir. 1976).

[4] "An 'inmate of a public institution' is a person who is living in a public institution and receiving treatment and/or services which are appropriate to the person's requirements." 20 C.F.R. 416.231(a)(3).

this class action in the United States District Court for the Northern District of Illinois, challenging the constitutionality of Section 1611(e)(1)(A)-(B) of the Social Security Act, 42 U.S.C. 1382(e)(1)(A)-(B), on the ground that their exclusion from SSI benefits violates the equal protection component of the Due Process Clause of the Fifth Amendment.[5]

The district court granted appellees' motion for summary judgment, holding that Section 1611(e)(1)(A)-(B) of the Act is unconstitutional (App. A, *infra*, 1a-20a).[6] The court first concluded that the

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[5] In their initial complaint, appellees sought declaratory, monetary, and injunctive relief against both the federal government and the State of Illinois, claiming that, in addition to Section 1611(e), various other state and federal statutory provisions were unconstitutional. See *Wilson* v. *Edelman*, *supra*, 542 F.2d at 1263. A three-judge district court denied class certification and dismissed appellees' claims against the Secretary for lack of jurisdiction on the ground that appellees had failed to exhaust their administrative remedies. The claim against the State was denied on substantive grounds. On appeal, the court of appeals held that the district court had jurisdiction over appellees' claims against the federal government under 42 U.S.C. 1383(c)(3) and remanded for consideration of appellees' claims for class certification and declaratory relief. *Id.* at 1275. The appeal from the order of the district court sustaining the constitutionality of the Illinois statute was dismissed for lack of jurisdiction. *Id.* at 1282.

[6] The court also certified the case as a class action, defining the class as (App. B, *infra*, 21a):

> all persons residing in HEW Region V who have been terminated from benefits under Title XVI, or who have applied for Supplemental Security Income benefits under Title XVI and have been denied such benefits, on or after

statutory classification discriminated on the basis of a person's mental health status (*id.* at 8a). It then determined that mental health classifications are sufficiently like classifications based on race and national origin to require a higher standard of judicial scrutiny than is normally applicable in reviewing social welfare legislation (*id.* at 9a-15a). In particular, the court ruled that mental health classifications "must serve important governmental interests and must be substantially related to achievement of those objectives" (*id.* at 17a, quoting *Califano* v. *Webster*, 430 U.S. 313, 316-317 (1977)). Applying this standard to the classification in the present statute, the court held that the governmental interests served by the classification[7] "are not of sufficient importance to sustain the exclusion of" members of appellees' class (*id.* at 17a).

THE QUESTION IS SUBSTANTIAL

The district court has held an Act of Congress unconstitutional. In doing so, the court incorrectly con-

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January 1, 1974, solely because they are between the ages of 21 and 65 and hospitalized in a public mental institution.

HEW Region V includes the States of Illinois, Indiana, Michigan, Minnesota, Ohio and Wisconsin.

[7] The Secretary had argued that the statutory classification was justified on three separate grounds (App. A, *infra*, 16a):

> 1) the conservation of federal resources; 2) the concern that federal funds be received on behalf of residents of qualified institutions; and 3) the fact that [appellees] are not "similarly situated" with Medicaid patients in terms of federal interest and control.

cluded that Section 1611(e)(1)(A)-(B) of the Social Security Act discriminates on the basis of mental health status. As we show below, the SSI classification is grounded, not on mental health considerations, but on eligibility for Medicaid benefits under Section 1905(a) of the Act. The exclusion from Medicaid coverage of persons aged 21 to 65 in mental institutions has been upheld against attack on equal protection grounds. *Legion* v. *Richardson*, 354 F. Supp. 456 (S.D. N.Y.) (three-judge court), aff'd *sub nom. Legion* v. *Weinberger*, 414 U.S. 1058 (1973); *Kantrowitz* v. *Weinberger*, 388 F. Supp. 1127 (D. D.C. 1974) (three-judge court), aff'd, 530 F.2d 1034 (D.C. Cir.), cert. denied, 429 U.S. 819 (1976). Moreover, assuming arguendo that a mental health classification is involved here, the court below erred in ruling that such a classification must be subjected to a heightened level of judicial scrutiny. If the court had applied the correct standard of review, it would have concluded that the federal government's interest in conserving resources by leaving to the states their traditional responsibility of providing for the mentally ill in state institutions provides a rational basis justifying the statutory classification.[8] Accordingly, review by this Court is appropriate.

1. As the Court remarked in *Califano* v. *Boles*, No. 78-808 (June 27, 1979), slip op. 12, "[t]he proper classification for purposes of equal protection

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[8] The Secretary estimates that the cost of providing benefits under the district court's order would be $7 million annually for Region V and $95 million annually nationwide.

analysis is not an exact science, but scouting must begin with the statutory classification itself." Contrary to the district court's conclusion (App. A, *infra*, 8a), the Social Security Act does not exclude individuals from SSI benefits on the basis of mental health. Rather, the statute classifies individuals for SSI purposes according to their Medicaid eligibility.

Section 1611(e)(1)(A) of the Act provides that residents of public institutions are ineligible for SSI benefits. The reason for this exclusion was Congress' belief that the needs of these individuals were being met by the institutions in which they resided. See H.R. Rep. No. 92-231, 92d Cong., 2d Sess. 149-150 (1971). See also *Baur* v. *Mathews*, 578 F.2d 228, 233, 234 (9th Cir. 1978). However, Congress drew one narrow exception to the exclusion. It provided in Section 1611(e)(1)(B) that residents of public institutions receiving Medicaid payments on their behalf are entitled to SSI benefits of up to $25 per month.[9]

The report of the House Committee explained the purpose of the exception:

> People who are residents of certain public institutions, or hospitals or nursing homes which are getting Medicaid funds, would get bene-

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[9] The amount of the monthly SSI payment depends on whether the resident has an eligible spouse. See 42 U.S.C. 1382(e)(1)(B)(i)-(iii). Under Section 1611(e)(1)(B) of the Act, Medicaid patients in private facilities are also eligible for SSI benefits of up to $25 per month. Individuals in private institutions who are not covered by Medicaid may be eligible for regular SSI payments, depending on their countable income. 42 U.S.C. 1382(a) and (b).

> fits of up to $25 a month (reduced by nonexcluded income). For these people most subsistence needs are met by the institution and full benefits are not needed. Some payment to these people, though, would be needed to enable them to purchase small comfort items not supplied by the institution. No assistance benefits will be paid to an individual in a penal institution.

H.R. Rep. No. 92-231, *supra*, at 150. See also H.R. Rep. No. 96-451 (Part 1), 96th Cong., 1st Sess. 153 (1979) (the $25 monthly SSI payment to Medicaid patients "is intended to take care of small personal expenses, with the cost of maintenance and medical care being provided through other programs."). Thus, Section 1611(e)(1)(B) provides a modest monthly allowance to institutionalized Medicaid recipients to enable them to purchase items not covered by the Medicaid program. Section 1611(e)(1)(A)-(B) serves the rational purpose of providing assistance to individuals in public institutions for whom the federal government has already assumed partial financial responsibility under Medicaid. It is therefore apparent that the distinction drawn by the statute is based on Medicaid eligibility, not on mental health.

The district court, however, appears to have concluded that the Medicaid program itself discriminates on the basis of mental health and that SSI's incorporation of the Medicaid eligibility scheme therefore reflects the mental health classification. But eligibility for Medicaid under Section 1905(a) of the Act does not turn on the mental health status of the individual. So long as they otherwise meet eligibility requirements, numerous categories of persons receiving treat-

ment for mental illness qualify for coverage under the Medicaid program, including those who are receiving their treatment in general care hospital facilities, skilled nursing facilities, and qualifying intermediate care facilities. 42 U.S.C. 1396d(a)(1), (4), (15). In addition, mentally ill persons under the age of 21 and those over 65 years of age can qualify for Medicaid coverage regardless of where they are treated. 42 U.S.C. 1396d(a)(14), (16). Because they are eligible for Medicaid benefits, these groups of mentally ill persons are not excluded from eligibility for SSI benefits under Section 1611(e)(1)(A)-(B). Furthermore, while some mentally ill persons who reside in public mental institutions may not receive Medicaid and SSI benefits, there is nothing in the legislative record (see pages 13-14, *infra*) to suggest that Congress "selected or reaffirmed a particular course of action at least in part 'because of,' not merely "in spite of,' its adverse effects upon an identifiable group." *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U.S. 256, 279 (1979). Accordingly, the court below erred in concluding that the Medicaid classification incorporated into Section 1611(e)(1)(B) is based on mental health considerations or was intended to discriminate against the mentally ill as a class.

If we are correct in our submission that the statutory scheme does not classify SSI recipients on the basis of mental health, then (as even the district court agreed (App. A, *infra*, 7a-8a)), the statute need only serve some rational objective in order to satisfy constitutional standards. See, *e.g.*, *Califano* v. *Azna-*

vorian, 439 U.S. 170, 174-175 (1978); *Califano* v. *Torres*, 435 U.S. 1, 5 (1978); *Mathews* v. *DeCastro*, 429 U.S. 181, 185 (1976); *Weinberger* v. *Salfi*, 422 U.S. 749, 770 (1975). As we show below (see pages 12-16, *infra*), the classification in this case unquestionably has a rational basis.

2. Even assuming that the statutory classification is based on mental health status, the district court improperly applied a heightened standard of review to that classification. The court determined that the mentally ill comprise a "quasi-suspect" class (App. A, *infra*, 9a-15a) and that distinctions according to mental health, like distinctions based on gender or legitimacy, must be "substantially related" to furthering "important governmental interests" (*id.* at 17a).[10]

Unlike classifications based on race, national origin, gender or legitimacy, mental health classifications do not warrant strict or "middle-tier" (App. A, *infra*, 13a) judicial scrutiny. The distinguishing feature of classifications based on race and national origin, the so-called "suspect" groups, is that members of such groups are identifiable by certain immutable characteristics, determined solely by accident of birth,

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[10] There are literally hundreds of statutes drawing distinctions on the basis of mental competence or mental illness, encompassing such diverse areas as marriage, property rights, contract rights, and the right to sue, make a will, engage in occupations, vote, hold office, serve on juries, and obtain driver's licenses. See S. Brakel & R. Rock, *The Mentally Disabled and the Law* 240-247, 315-340 (1971 ed.). Such laws are in addition to the numerous laws concerning hospitalization and treatment. See *Addington* v. *Texas*, 441 U.S. 418 (1979).

that bear "no relation to the individual's ability to participate in and contribute to society." *Mathews* v. *Lucas*, 427 U.S. 495, 505 (1976). See also *Frontiero* v. *Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion). Mental illness, by contrast, is not necessarily permanent or determined by accident of birth. Perhaps most important, as the district court itself acknowledged (App. A, *infra*, 11a), mental illness is directly related to an individual's ability to "perform or contribute to society." See *Doe* v. *Colautti*, 592 F.2d 704, 711 (3d Cir. 1979). Because mental illness is a neutral factor that cuts across racial and other suspect boundaries and relates directly to an individual's ability to perform, it is equivalent to "such nonsuspect statuses as intelligence or physical disability * * *." *Frontiero* v. *Richardson*, *supra*, 411 U.S. at 686 (plurality opinion).[11] The district court therefore erred in subjecting the statutory classification to heightened scrutiny.

3. Application of the correct standard of judicial review leads to the conclusion that Section 1611(e)(1)(A)-(B) of the Social Security Act is constitu-

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[11] The mentally ill, moreover, are not necessarily a "politically impotent" group (App. A, *infra*, 11a-12a), as evidenced by the fact that the very benefits that appellees seek in this litigation previously have been extended by Congress to several categories of mentally ill persons, including those between 21 and 65 years of age. Moreover, in asserting that the mentally ill have been subject to a history of unequal protection (*id.* at 12a), the district court failed to consider whether the unequal treatment may be attributable in large measure to the actual disabilities from which many of the mentally ill suffer. See *Doe* v. *Colautti*, *supra*, 592 F.2d at 711.

tional. The decision to exclude patients between 21 and 65 years of age in public mental hospitals from the Medicaid program and, by extension, from the SSI program, is reasonably related to legitimate congressional concerns. A brief review of the legislative history of the Medicaid program is necessary in order to understand the reasons for the statutory classification.

In 1950, Congress adopted a system of federal grants to the states for the operation of state programs to aid the permanently and totally disabled. The statute establishing the aid program specifically excluded payments on behalf of "any individual * * * who is a patient in an institution for * * * mental diseases." Act of August 28, 1950, ch. 809, 64 Stat. 558. When Congress adopted the Medicaid Act in 1965 (Pub. L. No. 89-97, 79 Stat. 286 *et seq.*), it retained the general exclusion of patients in institutions for treatment of mental illness. Pub. L. No. 89-97, Section 1905(a)(1), (4), (15)(B), 79 Stat. 351-532. This exclusion was based on Congress' belief that the long term care of patients in mental institutions "had traditionally been accepted as a responsibility of the States." S. Rep. No. 404, 89th Cong., 1st Sess. 144 (1965). At the same time, however, Congress did provide Medicaid coverage to the needy aged in mental institutions (Pub. L. No. 89-97, Section 1905(a)(14), 79 Stat. 351-352), in recognition of the severe health cost problems of persons over 65

years of age. See S. Rep. No. 404, *supra*, at 277 (supplemental views).[12]

In 1972, Congress further broadened the class of mental patients eligible for Medicaid by providing for the eligibility of children. Pub. L. No. 92-603, Section 299B(a), (b), 86 Stat. 1460-1461. The 1972 amendments extended Medicaid coverage to persons under age 21 who are inpatients in psychiatric hospitals, provided that the treatment is certified as being likely to improve the patient's condition. In providing for this expansion of coverage, Congress expressed its belief that "the nation cannot make a more compassionate or better investment in medicaid than this effort to restore mentally ill children to a point where they may very well be capable of rejoining and contributing to society as active and constructive citizens." S. Rep. No. 92-1230, 92d Cong., 2d Sess. 281 (1972).[13]

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[12] Medicaid coverage was also provided for the treatment of the mentally ill in general care facilities, including nursing homes and medical hospitals. Pub. L. No. 89-97, Section 1905 (a)(1), (4), 79 Stat. 351. In providing this assistance, Congress sought to encourage alternative forms of treatment for the mentally ill outside the traditional setting of the mental institution. S. Rep. No. 404, *supra*, at 144-147.

[13] A Senate proposal to authorize demonstration projects for the purpose of evaluating the feasibility of extending Medicaid coverage to persons between the ages of 21 and 65 in mental hospitals (see S. Rep. No. 92-1230, *supra*, at 281) was rejected in conference. See H.R. Conf. Rep. No. 92-1605, 92d Cong., 2d Sess. 65 (1972).

The legislative record establishes that the general exclusion from Medicaid coverage of persons in mental institutions is reasonably related to Congress' belief that the care of the mentally ill in mental hospitals is properly the responsibility of the states. The statutory classification was specifically upheld on that basis in *Legion* v. *Richardson*, 354 F. Supp. 456, 459 (S.D.N.Y.) (three-judge court), aff'd *sub nom. Legion* v. *Weinberger*, 414 U.S. 1058 (1973). Insofar as the Medicaid program distinguishes on the basis of age, by extending coverage to children and the aged in mental institutions while excluding those between 21 and 65 years of age, that age-based distinction was properly upheld in *Kantrowitz* v. *Weinberger*, 388 F. Supp. 1127, 1129-1131 (D.D.C. 1974) (three-judge court), aff'd, 530 F.2d 1034 (D.C. Cir.), cert. denied, 429 U.S. 819 (1976). As the district court in *Kantrowitz* concluded, because of its concern with the enormous expense involved in supplementing traditional state aid to the mentally ill, Congress could rationally decide to extend Medicaid coverage one step at a time to those perceived as most in need of assistance. 388 F.Supp. at 1131. See *Califano* v. *Jobst*, 434 U.S. 47, 57 (1977); *Jefferson* v. *Hackney*, 406 U.S. 535, 546 (1972).

The resulting exclusion from SSI benefits of persons between the ages of 21 and 65 in public mental institutions is justifiable for the same reasons that the Medicaid classification was upheld in *Legion* and *Kantrowitz*. It was reasonable for Congress to continue its past practice of leaving to the states the re-

sponsibility of providing for the needs of persons in public mental hospitals. The inclusion under SSI of those persons in mental hospitals already receiving Medicaid benefits was based on Congress' desire to expend a limited amount of resources to provide a small supplemental allowance to those thought to be in need of special assistance.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

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MARCH 1980

APPENDIX A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 73 C 2337

THOMAS STERLING, ET AL., individually and on behalf of all others similarly situated, PLAINTIFFS

vs.

PATRICIA R. HARRIS, Secretary of the Department of Health, Education and Welfare, DEFENDANT

No. 73 C 3070

CHARLES EDWARD WILSON, ET AL., individually and on behalf of all others similarly situated, PLAINTIFFS

vs.

PATRICIA R. HARRIS, Secretary of the Department of Health, Education and Welfare, DEFENDANTS

Before the HONORABLE NICHOLAS J. BUA
United States District Judge

ORDER

These consolidated cases are here on remand from the Seventh Circuit Court of Appeals, where the plaintiffs successfully challenged a district court's dismissal of their complaint for lack of jurisdiction. *Wilson* v. *Edelman*, 542 F.2d 1260 (7th Cir. 1976). As noted by the court of appeals, jurisdiction over

this matter arises under 42 U.S.C. § 1383(c)(3). 542 F.2d at 1269. Before the court are the parties' cross-motions for summary judgment.

The plaintiffs challenge the constitutionality of 42 U.S.C. § 1382(e)(1)(A)-(B).[1] These subsections,

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[1] 42 U.S.C. § 1382(e)(1)(A) provides:

Limitation on eligibility of certain individuals:

Except as provided in subparagraph (B) no person shall be an eligible individual or eligible spouse for purposes of this subchapter with respect to any month if throughout such month he is an inmate of a public institution.

42 U.S.C. § 1382(e)(1)(B) provides in pertinent part:

In any case where an eligible individual or his eligible spouse (if any) is, throughout any month, in a hospital extended care facility, nursing home, or intermediate care facility receiving payments (with respect to such individual or spouse) under a State plan approved under subchapter XIX of this chapter, the benefit under this subchapter for such individual for such month shall be payable . . . (i) at a rate not in excess of $300 per year [$25.00 per month].

The Title XIX program referred to in section 1382(e)(1)(B) is the Medicaid Program.

Benefits available under Medicaid include:

in-patient hospital services (other than services in an institution for tuberculosis or mental disease) in both public and private hospitals.
skilled nursing home services.
intermediate care facility services, including services in public institutions for the mentally retarded.
in-patient hospital services and skilled nursing home services for individuals 65 years of age or over in an institution for turberculosis or mental diseases.
in-patient psychiatric hospital services for individuals under age 21.

42 U.S.C. § 1396d(a)(1)(4)(14)(15)(16).

when read together, serve to exclude certain plaintiffs, who are aged, blind, and/or disabled individuals, from benefits received by other such individuals under the federally funded Supplemental Security Income Program (SSI), 42 U.S.C. § 1381 *et seq.* The plaintiffs claim that this exclusion constitutes a violation of their rights to equal protection under the Fourteenth Amendment.

The facts of the two cases are undisputed. Plaintiffs represent two classes of individuals: residents of public mental health institutions between the ages of twenty-one and sixty-five (the *Wilson* plaintiffs) (No. 73 C 3070), and pretrial detainees (the *Sterling* plaintiffs) (No. 73 C 2337). The exclusion of these two groups from receipt of benefits is not directly stated in the statute. Instead, it arises from a series of related provisions.

I. THE PUBLIC MENTAL HEALTH INSTITUTION EXCLUSION

The statute provides initially that all aged, blind, or disabled individuals who are found to be eligible under the Act are entitled to receipt of SSI benefits paid by the Secretary of Health, Education and Welfare. 42 U.S.C. § 1381a.[2] The exclusion at issue in the present case arises from two modifying provisions. The first of these provisions provides that inmates of public institutions are not eligible for SSI benefits.

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[2] Full SSI benefits payable to an individual with no other source of income were $146 a month at the time of the statute's 1974 enactment and have since increased with cost-of-living adjustments. 42 U.S.C. § 1382(b)(1).

42 U.S.C. § 1382(e)(1)(A). This general exclusion is then altered, however, by 42 U.S.C. § 1382(e)(1)(B), which provides a maximum $25 per month stipend to inmates of institutions that are eligible to receive payments on behalf of individuals under the Medical Assistance title (Medicaid).

The exclusion of the *Wilson* plaintiffs from the $25 per month living stipend results from this use of the Medicaid subchapter in determining eligibility for the SSI benefits. The Medicaid statute, 42 U.S.C. § 1396 *et seq.*, while providing for payments to most public and private medical facilities, 42 U.S.C. § 1396d(a)(1)-(17), excludes from its coverage payments on behalf of an individual who is between the ages of twenty-one and sixty-five and who is a patient in a public institution for mental illness. 42 U.S.C. § 1396d(a)(16), (17)(A)-(B). Thus, the *Wilson* plaintiffs note that while needy aged, blind and disabled persons in institutions are ordinarily eligible to receive the $25 a month SSI benefit, their class has been excluded because the Medicaid eligibility scheme has been pyramided into the SSI statute. This exclusion is said to violate the equal protection clause.

A. The Appropriate Level of Review: The Three-Tier Approach

The Supreme Court has used a three-tier analysis in scrutinizing legislation that has created a classification that has served to exclude a certain group from its benefits. *See* L. Tribe, American Constitutional Law 1082 (1978). The usual form of review,

the "rational relationship test" or "minimal scrutiny" analysis, requires only that the statute bear some rational or reasonable relation to a legitimate state interest. *See e.g., Dandridge* v. *Williams*, 397 U.S. 471 (1970). If this test is employed, the defendant must show merely that "the distinctions that are drawn have some relevance to the purpose for which the classification is made." *Rinaldi* v. *Yeager*, 384 U.S. 305, 309 (1966).

The second level of review frequently employed by the Court is the "strict scrutiny" test. If a suspect class, *Graham* v. *Richardson*, 403 U.S. 365 (1971) (alienage); *Loving* v. *Virginia*, 388 U.S. 1 (1967) (race); *Oyama* v. *California*, 332 U.S. 633 (1948) (national origin), or a fundamental interest, *Shapiro* v. *Thompson*, 394 U.S. 618 (1969) (interstate travel); *Harper* v. *Virginia Bd. of Elections*, 383 U.S. 663 (1966) (voting) is involved, the Court will require that a challenged statute be a necessary means of furthering a compelling state interest if it is to withstand an equal protection challenge. *See San Antonio Independent School Dist.* v. *Rodriguez*, 411 U.S. 1, 16 (1973).

A third level of scrutiny, that of a heightened or intermediate judicial review has recently evolved. *See Gunther, The Supreme Court, 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1 (1972). This tier has been employed by the Court in scrutinizing legislation that serves to discriminate against groups that possess certain charac-

teristics in common with the suspect groups. *See* L. Tribe, American Constitutional Law 1090. While the Court has been hesitant to recognize new suspect classifications, it has recognized instead certain "quasi-suspect" groups that will receive an intermediate level of judicial review. *Trimble* v. *Gordon*, 430 U.S. 762 (1977) (illegitimacy); *Frontiero* v. *Richardson*, 411 U.S. 677 (1973) (sex). Under this level of scrutiny a classification "must serve important governmental objectives and must be substantially related to achievement of those objectives." *Califano* v. *Webster*, 430 U.S. 313, 316-17 (1977). *See Craig* v. *Boren*, 429 U.S. 190, 197 (1976).

Accordingly, the equal protection analysis here must begin with an analysis of the classification created by the statute and a determination of whether that classification discriminates on the basis of either suspect or quasi-suspect criteria.[3] As recently noted by the Supreme Court, "proper classification for purposes of equal protection analysis is not an exact science, but scouting must begin with the statutory classification itself." *Califano* v. *Boles*, —— U.S. ——, ——, 99 S. Ct. 2767, 2775 (1979).

B. The Statutory Classifications

The statute at issue in the present case creates three classifications: (1) age, and (2) residence in a public, (3) mental health hospital.

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[3] There has been no infringement of a fundamental interest in the present case. *See Flemming* v. *Nestor*, 363 U.S. 603, 610-11 (1960).

1. *Age*

Age classifications have not been recognized as suspect for purposes of equal protection analysis. *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307 (1976); *Trafelet* v. *Thompson*, 594 F.2d 623 (7th Cir.) *cert. docketed* 48 U.S.L.W. 3001 (June 25, 1979). Thus, if, as the defendant claims, the classification in the present case is based on age alone, lower-tier scrutiny would apply, and the defendant would have to show merely a rational relationship between the classification and a legitimate state interest. *See Murgia, supra.*

There is certainly an age classification present here, for only those inmates of public mental health institutions who are between the ages of twenty-one and sixty-five are excluded from receipt of the SSI benefits. Age, however, is not the sole operative factor in this classification. Blind and disabled persons between the ages of twenty-one and sixty-five who do not reside in public mental hospitals are eligible to receive benefits under the statute. Thus, the statute discriminates on the basis of residence in a public mental health institution as well as age, and this court's analysis must continue on the basis of impact upon people residing in such institutions.

2. *Residence in a public institution*

The statute's distinction between residents of public and private institutions withstands equal protection scrutiny. Residence in a public institution has

never been recognized as a classification that compels a heightened level of equal protection scrutiny, nor can this court discern any commonalities between this classification and those that have received such treatment. Thus, lower-tier "rational relation" scrutiny must be applied.

Since a classification that furthers any legitimate state purpose can survive lower-tier analysis, the public/private classification, by itself, must be upheld. The purpose for classifying according to public and private institutions is apparent in the statutory scheme. Congress recognized that most subsistence needs of public institution inmates were being met, and they were not in need of equal treatment under the full SSI benefits. 1972 U.S. Code Cong. and Admin. News. 4989 at 5136. Congress could well conclude that public institution inmates are receiving all of the funds from the public treasury to which they are entitled. *See Dandridge* v. *Williams*, 397 U.S. 471 (1970).

3. *Mental illness*

If the statute classified only according to age and residence in a public institution, it would merely have to pass minimal judicial scrutiny. The statute, however, also classifies according to mental health, for residents of public general health hospitals are eligible for the benefits while certain residents of public mental health hospitals are not. Thus, it is necessary to determine the appropriate level of review to be employed in reviewing a mental health classification.

C. Mental Health Classifications Deserve Quasi-Suspect Status

The *Wilson* plaintiffs assert that while mental illness is not likely to be considered a suspect classification (e.g. based on race, alienage, or national origin), the classification should be subject to the intermediate level of scrutiny that has been recognized for "quasi-suspect" groups (e.g. women and illegitimate children) having certain characteristics of the suspect classes. In the alternative, the plaintiffs urge that the exclusion at issue in the present case wholly fails to meet even minimal standards of rationality. Defendants claim that the heightened level of judicial scrutiny would be inappropriate for a mental health classification, and they assert that the classification survives minimal scrutiny, for it is reasonably related to a legitimate state interest.

No Supreme Court [4] or court of appeals case characterizing mental illness for purposes of equal pro-

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[4] The Supreme Court has made a summary affirmance of a district court decision upholding the exclusion of persons under the age of sixty-five from Medicaid and Medicare coverage of in-patient mental hospital treatment. *Legion* v. *Weinberger*, 354 F. Supp. 456 (S.D. N.Y. 1973), *aff'd* 414 U.S. 1058 (1973). However, the precedential effect of a summary affirmance extends no further than the precise issues presented and necessarily decided by the action of the lower court. *Ill. State Bd. of Elections* v. *Socialist Workers Party*, —— U.S. ——, ——, 99 S. Ct. 983, 985 (1979); *Mandel* v. *Bradley*, 432 U.S. 173, 176 (1977). The district court never discussed whether the mental illness classification demanded heightened judicial scrutiny. Further, the lower court cited legislative history to show Congressional awareness that the care of the mentally ill in state hospitals was historically the responsibility of the states. 354 F. Supp. at 459, citing 1965 U.S. Code Cong. and Admin. News 2086.

tection analysis has been called to the attention of this court. Without the benefit of such direction, it is necessary for this court first to discern the common indicia of the groups that have been distinguished as being suspect or quasi-suspect classification, and then to determine whether a mental health classification is analogous. This is not easily accomplished, for several different indicia have been enunciated by the Supreme Court in its cases, and additional factors have been identified by commentators.

1. *The indicia of suspect classes*

In *Frontiero* v. *Richardson*, 411 U.S. 677 (1973), the Supreme Court depicted two related indicia of the suspect classifications. In addressing a claim of gender-based discrimination, the Court first noted that "sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth." *Id.* at 686. *See Korematsu* v. *United States*, 323 U.S. 214, 243 (1944) (Jackson, J., dissenting). The Court followed this description by noting a second suspect trait that the characteristic "frequently bears no relation to ability to perform or contribute to society." 411 U.S. at 686.

The suspect indicia have received further delineation in other Supreme Court cases. In *Graham* v. *Richardson*, 403 U.S. 365, 372 (1971), the Court indicated that suspect classifications are those that discriminate against discrete and insular minorities

that are unable to express a potent voice in the political process. *See United States* v. *Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938). A further depiction arose in *San Antonio School District* v. *Rodriguez*, 411 U.S. 1, 28 (1973), where the Court recognized the need to provide heightened scrutiny in favor of groups that "are saddled with such disabilities or subject to such a history of purposeful unequal treatment . . . as to command extraordinary protection. . . ." This characteristic has also been referred to as a "stigma of inferiority and badge of opprobrium" common to the suspect groups. *Developments in the Law—Equal Protection*, 82 Harv. L. Rev. 1065, 1127 (1969).

2. *Mental health classifications involve the most significant suspect indicia*

In applying these indicia to the mental health classification created by the present statute, the court finds that only one of the indicia used to define suspect classes is absent in this case. A mental health problem sufficient to cause institutionalization will necessarily "bear [a] relation to ability to perform or contribute to society." *Frontiero* v. *Richardson*, 411 U.S. 677, 686 (1973). The existence of disadvantages based on that criteria are therefore understandable.

Aside from this characteristic, it appears that mental health classifications possess the significant indicia of the suspect classifications recognized in other cases. The mentally ill are a politically im-

potent, insular minority. Inmates in a public mental health institution enjoy limited rights of association and necessarily have difficulty combining with other groups in our society to further their interests. *See United States* v. *Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938).

Indeed, such insularity has been recognized as the most significant indicium of the suspect classifications. *See* L. Tribe, American Constitutional Law 1003, 1077 (978); Ely, *Toward a Representation-Reinforcing Mode of Judicial Review*, 37 Md. L. Rev. 451 (1978).

Further, the mentally ill have been subject to a "history of unequal protection." *San Antonio School District* v. *Rodriguez*, 411 U.S. 1, 28 (1973). Indeed, the present legislative classification, by denying inmates of public health institutions the funds necessary to purchase personal, non-institutional items, serves to "perpetuate a feeling of inferiority as to their status in the community . . . [and its] impact is greater when it has the sanction of law." *Brown* v. *Board of Education*, 347 U.S. 483, 494 (1954). This factor has also been considered as perhaps the most important factor in determining new suspect categories. *See Developments in the Law-Equal Protection*, 82 Harv. L. Rev. 1065, 1127 (1969).

It is debatable whether and to what extent the mental illness is "an immutable characteristic determined solely by the accident of birth." *Frontiero* v. *Richardson*, 411 U.S. 677, 686 (1973). It would seem that the policy behind this indicium—to extend

extra protection to persons that have been identified by a factor over which they have no control—is satisfied in the case of the mentally ill.

3. *Prior district court decisions*

Several district courts have applied these indicia in classifying mental illness for purposes of equal protection analysis. Two district courts have refused to apply strict scrutiny. In *New York State Assoc. for Retarded Children* v. *Rockefeller*, 357 F. Supp. 752, 762 (E.D. N.Y. 1973), the court held that the plaintiff class, residents of a New York institution for the mentally retarded, had not been discriminated against on the basis of suspect criteria. The court there, however, only considered the traditional two-tier test and did not consider the possibility that mental health classifications fall under the middle-tier test which has since become more clearly established.

In a second case, *Doe* v. *Colautti*, 454 F. Supp. 621 (E.D. Pa. 1978), the *Frontiero* indicia were cited by the court in its refusal to apply strict scrutiny to legislation imposing a 60-day limitation on benefits for psychiatric care. The court noted, however, that middle-tier scrutiny may have been appropriate for reviewing the statute, but such a determination was unnecessary since the statutory scheme would have survived scrutiny under this heightened standard of review. *Id.* at 632.

Two district courts have found middle-tier scrutiny appropriate for reviewing legislation that classifies

according to various types of mental disabilities. In *Frederick* v. *Thomas*, 408 F. Supp. 832, 836 (E.D. Pa. 1976), the court noted that while learning disabled children were not members of a suspect class, their minority status and political powerlessness supported an application of the "middle test" of equal protection. Similarly, in *Fialkowski* v. *Shapp*, 405 S. Supp. 946, 958-59 (E.D. Pa. 1975) the court recognized the need to apply "greater judicial scrutiny" to the claims of the mentally retarded. To support its use of this heightened review, the court cited *San Antonio Independent School Dist* v. *Rodriguez*, 411 U.S. 1, 28 (1973) for the proposition that political powerlessness and purposeful unequal treatment are shared by the suspect classes. 405 F. Supp. at 958-59.

In addition to these two district court holdings, various commentators have recognized a need for applying an intermediate level of scrutiny to statutes that classify mental health. *See* Burgdorf & Burgdorf, *A History of Unequal Treatment: The Qualifications of Handicapped Persons as a "Suspect Class" Under the Equal Protection Clause*, 15 Santa Clara Law. 855, 902-08 (1975); Note, *Mental Illness: A Suspect Classification*, 83 Yale L.J. 1237 (1974); Comment, *Wyatt* v. *Stickney and the Rights of Civilly Committed Mental Patients to Adequate Treatment*, 86 Harv. L. Rev. 1282, 1294 & n.62 (1973).

The court concludes that the common indicia that mental health shares with the suspect classifications are of sufficient importance to require the present

statutory classification to pass an intermediate level of judicial scrutiny.

C. The Asserted Legislative Purposes are Insufficient to Uphold the Statutory Classification

Middle-tier scrutiny requires that a statutory classification must be "reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation." *Reed* v. *Reed*, 404 U.S. 71, 76 (1971), *quoting Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415 (1920). *See Orr* v. *Orr*, —— U.S. ——, 99 S. Ct. 1102 (1979); *Califano* v. *Webster*, 430 U.S. 313, 316-17 (1977); *White* v. *Fleming*, 522 F.2d 730, 734-35 (7th Cir. 1975). The court must therefore ascertain the object of this legislation and determine whether this classification bears a substantial relation to this objective.[5]

The legislative discrimination must be evaluated in light of the primary purpose of the legislative scheme of which it is a part. *Weinberger* v. *Weisenfield*, 420 U.S. 636, 645 (1976). The legislative history of this statute indicates that the $25 per month stipend to residents of public institutions was intended to enable them to purchase small comfort items not provided by the institution. 1972 U.S. Code Cong. and Admin. News 4989, 5136. This history reveals no articulated legislative intent to ex-

[5] *See note, Legislative Purpose, Rationality, and Equal Protection*, 82 Yale L.J. 123 (1973) (discussing means-end scrutiny).

clude inmates of mental health institutions from these benefits, nor can this court conceive of a possible unexpressed purpose for the exclusion. It would seem that aged, blind, and disabled inmates of all public institutions would have similar needs. Indeed, the legislative history shows that the only group Congress expressly focused on excluding from these benefits were inmates in penal institutions. *Id.*

While the legislative history of the SSI statute reveals no express purpose for the use of the Medicaid eligibility scheme, the defendant suggests that it is justified for three reasons: 1) the conservation of federal resources; 2) the concern that federal funds be received on behalf of residents of qualified institutions; and 3) the fact that plaintiffs are not "similarly situated" with Medicaid patients in terms of federal interest and control.

The first of these asserted state interests will not sustain the classification created by the SSI statute. Maintaining fiscal integrity is a legitimate concern of government, but government may not limits its expenditures by making invidious distinctions between classes of its citizens. *Graham* v. *Richardson*, 403 U.S. 365, 374-75 (1971); *Shapiro* v. *Thompson*, 394 U.S. 618, 633 (1969). The conservation argument must fail, for the SSI statute has created such an invidious distinction by classifying on the basis of quasi-suspect criteria.

The remaining two purposes that have been advanced in support of the statute's use of the Medicaid eligibility scheme are similarly unconvincing. The

Medicaid statute provides payments to institutions to meet the subsistence needs of eligible individuals. The SSI statute provides supplemental income to the residents of Medicaid-eligible public institutions so that they may purchase personal items. Aged, blind, and disabled residents of public mental health hospitals are equally in need of this monthly stipend—the source of their subsistence payment bears no relation to their need for supplementary income.

A legislative classification that excludes a quasi-suspect group from its benefits "must serve important governmental interests and must be substantially related to achievements of those objectives." *Califano* v. *Webster*, 430 U.S. 313, 316-17 (1977). The governmental interests that are served by this mental health classification are not of sufficient importance to sustain the exclusion of the Wilson class. The exclusion appears to have been an accidental by-product of the legislative scheme rather than an intended means of achieving a calculated legislative objective.

Accordingly, the *Wilson* plaintiffs' motion for summary judgment is granted. The section of the Social Security Act that serves to exclude plaintiffs from receipt of SSI benefits is hereby struck down as violative of the Equal Protection Clause, and the defendant shall begin payments under the Act to all eligible inmates of public mental health institutions.

II. THE PRETRIAL DETAINEE EXCLUSION

The *Sterling* plaintiffs urge that the statute's exclusion of pretrial detainees will not withstand equal protection analysis. To determine the validity of this claim, the court again must apply the test formulated by the Supreme Court. In so doing, the court finds that neither strict scrutiny nor middle-tier scrutiny is the appropriate standard of review for this classification.

The challenged exclusion of the plaintiff class from receipt of the SSI benefit neither abridges a fundamental liberty [6] nor discriminates according to suspect criteria. The Supreme Court has directly held that pretrial detainees are not a suspect class. *Goosby* v. *Osser* 409 U.S. 512, 520 (1973), *citing McDonald* v. *Board of Election Commissioners,* 394 U.S. 802, 807-08. The Supreme Court has not considered whether quasi-suspect status might apply; this court concludes that such status would be inappropriate for pretrial detainees do not possess the significant indicia of the suspect classes.

The first of these indicia, that a suspect classification is based upon an immutable trait determined by the accident of birth, *Frontiero* v. *Richardson,* 411 U.S. 677, 686 (1973) is not descriptive of pretrial detainees. This class shares a status that arises during the individual's lifetime and is temporary in nature. Neither do pretrial detainees share a second characteristic of the suspect classes—that the com-

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[6] *See Flemming* v. *Nestor,* 363 U.S. 603, 610-11 (1960).

mon trait bears no relation to the person's ability to contribute to society. *See Frontiero*, 411 U.S. at 486. Confinement in a penal institution will prevent the detainee from full participation in societal matters and is based on a determination that is related in some degree to the detainee's prior participation in society. Finally, the fluid class of pretrial detainees cannot claim the history of purposeful inequal treatment that is shared by the suspect groups. *See San Antonio School District* v. *Rodriguez*, 411 U.S. 1, 28 (1973).

The challenged social welfare legislation, therefore, will be sustained if it is shown to bear a rational relation to a legitimate state interest. *Dandridge* v. *Williams*, 397 U.S. 471, 487 (1970); *McDonald, supra* at 809. This conclusion is supported by the Supreme Court's recent holding in *Bell* v. *Wolfish*, —— U.S. ——, 99 S. Ct. 1861 (1979). Although the *Wolfish* Court was evaluating the constitutionality of certain conditions of pretrial detention, the Court's refusal to exercise a heightened form of judicial review is applicable here. The court noted that "the determination whether these restrictions and practices constitute punishment in the constitutional sense depends on whether they are rationally related to a legitimate nonpunitive governmental purpose and whether they appear excessive in relation to that purpose." —— U.S. at ——, 99 S. Ct. at 1885-1886. The Court's use of the rational relation test in a case involving conditions of confinement supports this

court's use of that test in evaluating the exclusion challenged in the present case.

The challenged classification must be upheld under this lower-tier scrutiny. Although pretrial detainees were not singled out for exclusion from the SSI benefit, Congress did express its intent to exclude the inmates in penal institutions. *See* 1972 U.S. Code Cong. and Admin. News 5136. Thus, the classification challenged by the *Sterling* plaintiffs does not appear to contravene the legislative purpose. Further, the exclusion of these detainees from the small benefit being received by residents of medicaid-eligible institutions is not the result of an irrational and invidious legislative choice. *See Jefferson* v. *Hackney*, 406 U.S. 535, 546 (1972). The detainee status is necessarily temporary in nature, and the defendant could legitimately wish to withhold these extra-subsistence payments while the detainee is housed in a public institution and until his future status is determined.

Accordingly, the exclusion of pretrial detainees from SSI benefits is sustained, and the *Sterling* action is dismissed.

IT IS SO ORDERED.

DATED: October 10, 1979

/s/ Nicholas J. Bua
NICHOLAS J. BUA
Judge
United States District Court

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 73 C 3070

CHARLES EDWARD WILSON, ET AL., PLAINTIFFS

vs.

PATRICIA HARRIS, DEFENDANT

JUDGMENT

On October 10th, 1979, this Court issued a decision and orders herein. Pursuant to F.R.C.P. 58, and all prior proceedings herein, this Court upon that decision, now ORDERS, ADJUDGES AND DECREES:

1. This Court has jurisdiction over this case under 42 U.S.C. § 1383(c)(3).

2. Pursuant to F.R.C.P. 23(c)(3) this action is certified as a class action, the requirements of F.R.C.P. 23(a) and (b)(2) having been met. The class is defined as:

> all persons residing in HEW Region V who have been terminated from benefits under Title XVI, or who have applied for Supplemental Security Income benefits under Title XVI and have been denied such benefits, on or after January 1, 1974, solely because they are between the ages of 21 and 65 and hospitalized in a public mental institution.

3. Pursuant to 28 U.S.C. § 2201, 42 U.S.C. § 1382 (e) (1) (A)-(B) is declared violative of the equal protection guarantees of the Due Process Clause of the Fifth Amendment to the United States Constitution, insofar as such provisions serve to exclude plaintiffs and members of the plaintiff class from the Supplemental Security Income program ("SSI"), 42 U.S.C. § 1381 *et seq.* benefits at the levels provided under 42 U.S.C. § 1382(e)(1)(B).

4. The decisions of the defendant denying or terminating SSI benefits to the named plaintiffs Turney and Simmons and the members of the plaintiff class are reversed.

5. The question of the date from which defendant is required to pay SSI benefits to the named plaintiffs and members of the plaintiff class is reserved and defendants need not make any such payments until any appeals taken from this Court's October 10th decision and this judgment are exhausted.

6. The second sentence of the October 10, 1979 "minute order" herein ("The defendant shall begin payments under the Act to all eligible inmates of public mental health institutions.") is vacated.

7.(a) The second sentence beginning on p. 12, line 12 of the October 10, 1979 Order is amended to read, in its entirety: "The section of the Social Security Act that serves to exclude plaintiffs from receipt of SSI benefits is hereby struck down as violative of the equal protection guarantees of the Due Process Clause of the Fifth Amendment."

(b) The reference on p. 2, line 5 of the October 10, 1979 Order to the "Fourteenth Amendment" is hereby amended to read the "Fifth Amendment."

8. Plaintiffs are awarded costs pursuant to 28 U.S.C. § 2412.

Date: Dec. 18, 1979

/s/ Nicholas J. Bua
NICHOLAS J. BUA
Judge
United States District Court

Entered: December 19, 1979

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Civil Action No. 73 C 3070

CHARLES EDWARD WILSON, ET AL., PLAINTIFFS

v.

PATRICIA HARRIS, Secretary of the
Department of Health, Education and Welfare,
DEFENDANT

NOTICE OF APPEAL

Notice is hereby given that the defendant, above named, hereby appeals to the Supreme Court of the United States, pursuant to the provisions of Title 28, United States Code, Sections 1252 and 1201, from the Memorandum and Order entered in this action on the 10th day of October, 1979.

[Received Nov. 8, 1979—H. Stuart Cunningham, Clerk, United States District Court]

UNITED STATES OF AMERICA

THOMAS P. SULLIVAN
United States Attorney

by /s/Canella E. Henrichs

CANELLA E. HENRICHS
Assistant United States Attorney
219 S. Dearborn, Suite 1500
Chicago, Ill. 60604
(312) 353-5342

APPENDIX D

1. Section 1611 of the Social Security Act, 42 U.S.C. 1382, provides in pertinent part:

> (a)(1) Each aged, blind, or disabled individual [who meets applicable income and resources requirements] shall be an eligible individual for purposes of this subchapter.
>
> * * * * *
>
> (e)(1)(A) Except as provided in subparagraph (B) and (C), no person shall be an eligible individual or eligible spouse for purposes of this subchapter with respect to any month if throughout such month he is an inmate of a public institution.
>
> (B) In any case where an eligible individual or his eligible spouse (if any) is, throughout any month, in a hospital, extended care facility, nursing home, or intermediate care facility receiving payments (with respect to such individual or spouse) under a State plan approved under subchapter XIX [the Medicaid provisions] of this chapter, the benefit under this subchapter for such individual for such month shall be payable—
>
> > (i) at a rate not in excess of $300 per year (reduced by the amount of any income not excluded pursuant to section 1382a(b) of this title) in the case of an individual who does not have an eligible spouse;
> >
> > (ii) in the case of an individual who has an eligible spouse, if only one of them is in such a hospital, home or facility throughout such month, at a rate not in excess of the sum of—

(I) the rate of $300 per year (reduced by the amount of any income, not excluded pursuant to section 1382a(b) of this title, of the one who is in such hospital, home, or facility), and

(II) the applicable rate specified in subsection (b)(1) of this section (reduced by the amount of any income, not excluded pursuant to section 1382a(b) of this title, of the other); and

(iii) at a rate not in excess of $600 per year (reduced by the amount of any income not excluded pursuant to section 1382a(b) of this title) in the case of an individual who has an eligible spouse, if both of them are in such a hospital, home, or facility throughout such month.

2. Section 1905 of the Act, 42 U.S.C. 1396d, provides in pertinent part:

For purposes of this subchapter—

(a) The term "medical assistance" means payment of part or all of the cost of the following care and services * * *

* * * * *

(1) inpatient hospital services (other than services in an institution for tuberculosis or mental diseases); * * *

(4)(A) skilled nursing facility services (other than services in an institution for tuberculosis or mental diseases) for individuals 21 years of age or older * * *;

* * * * *

(14) inpatient hospital services, skilled nursing facility services, and intermediate care facility services for individuals 65 years of age or over in an institution for tuberculosis or mental diseases;

(15) intermediate care facility services (other than such services in an institution for tuberculosis or mental diseases) for individuals who are determined, in accordance with section 1396a(a)(31)(A) of this title, to be in need of such care;

(16) effective January 1, 1973, inpatient psychiatric hospital services for individuals under age 21, as defined in subsection (h) of this section;

* * * * *

except as otherwise provided in paragraph (16), such term does not include—

* * * * *

(B) any such payments with respect to care or services for any individual who has not attained 65 years of age and who is a patient in an institution for tuberculosis or mental diseases.

* * * * *

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No. 79-1380

AUG 15 1980

MICHAEL RODAK, JR., C

In the Supreme Court of the United States

OCTOBER TERM, 1979

PATRICIA R. HARRIS, SECRETARY OF HEALTH AND HUMAN SERVICES, APPELLANT

v.

CHARLES EDWARD WILSON, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

JOINT APPENDIX

JURISDICTIONAL STATEMENT DOCKETED MARCH 7, 1980

PROBABLE JURISDICTION NOTED MAY 27, 1980

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CIVIL DOCKET UNITED STATES DISTRICT COURT

CHARLES EDWARD WILSON,
MICHAEL IRENE WELCH, individually and on behalf of all others similarly situated,

Plaintiffs

v

JOEL EDELMAN, Director of the Illinois Department of Public Welfare, and
CASPER WEINBERGER, Secretary of the Department of Health, Education, and Welfare,

Defendants

12-5-73	Filed complaint for Declaratory Judgment and Injunctive Relief and six copies. JS-5
12-5-73	Filed Designation.
12-5-73	Filed Affidavit under Rule 39.
12-5-73	Filed Motion to Proceed in Forma Pauperis.
12-5-73	Leave granted to file complaint in forma pauperis. MC MILLEN, J. Notices mailed 12-12-73
12-5-73	Issued summons and five copies with five copies of complaint.
12-13-73	Filed summons returned served as to Casper Weinberger, Joel Edelman, and U.S. Attorney. (3 services)
2-5-74	Filed Governments notice of motion with motion for an extension of time, attached.
2-6-74	Enter order; Governments motion for an extension of time to answer or otherwise plead from February 12, 1974 to and including March 18, 1974 granted. Marshall, J-DRAFT Mailed notices 2-7-74.

2-19-74	It is ordered that a preliminary pretrial conference is scheduled for March 21, 1974 at 9:30 a.m. in chambers of Judge Marshall Room 2178. Marshall, J Mailed notices 2-20-74.
2-19-74	Filed appearance of Joel Edelman as defendant and that of William J. Scott as his attorney.
2-19-74	Filed Defendants notice of filing.
2-19-74	Filed Defendant Edelman's motion to dismiss.
2-22-74	Filed Defendant Edelman's notice of motion.
2-22-74	Filed Defendant Edelman's motion for leave to file response to complaint, instanter,
2-22-74	Motion for leave to file instanter and motion to dismiss, granted to defendants motion to file instanter answer to the complaint Motion to dismiss taken under Rule 13, F.R.C.P. Marshall, J Mailed notices 2-25-74.
2-27-74	Filed plaintiffs motion to convene a three judge court and memorandum in support of said motion.
3-18-74	Filed answer to complaint of defendant, Casper Weinberger, Secretary Dept. of Health, Education and Welfare for declaratory judgment and injunctive relief.
3-18-74	Filed Amended complaint for declaratory judgment and injunctive relief.
3-21-74	Filed Plaintiffs statement of the case.
3-21-74	Pretrial conference held attended by counsel for all parties. Plaintiffs granted leave nunc pro tunc March 18, 1974 to file their Amended Complaint. Defendants granted 30 days to

	respond to Amended complaint and plaintiffs motion to convene 3 judge court. Plaintiff granted 7 days to reply cause set for further pre-trial conference May 21, 1974 at 9 A.M.—Marshall, J Mailed notices 3-22-74
4-19-74	Filed defendant Edelmans notice of motion with first amended motion to dismiss attached: memorandum in support.
**3-21-74	Filed Plaintiff's request to admit.
4-22-74	Filed defendants notice of filing.
4-22-74	Filed defendants Answer to the Request to Admit.
4-29-74	Plaintiffs motion to take motion to convene three judge court under advisement. Court to take motion under advisement. Marshall, J Mailed notices 4-30, 1974.
5-3-74	Filed defendant Caspars Weinbergers Answer to the Amended Complaint for Declaratory and Injunctive Relief.
5-9-74	Filed plaintiffs' request to produce.
5-21-74	Pretrial conference held. Attended by counsel for all parties; The court announces that it intends to convene a three-judge court pursuant to 28 U.S.C. 2281 and 2282, opinion to follow; All defendants ordered to produce records regarding named plaintiffs by June 11, 1974 plaintiffs to file motions for summary judgment by June 25, 1974 defendants to respond and present any cross-motions summary judgment by July 16, 1974; a plaintiffs to reply by July 30, 1974. Defendant Edelmans motion to dismiss taken under advisement by three-judge court. Marshall, J Mailed notices 5-23-74.

6-28-74	Filed plaintiffs motion for extension of time for filing motion for summary judgment.
7-1-4	Enter order dated June 28, 1974: Enter order Plaintiffs motion for summary judgment to be filed by July 12, 1974. Defendants to respond and present any cross motions for summary judgment by August 5, 1974/and plaintiffs reply by August 19, 1974. Marshall, J Mailed notices 7-1-74.
7-12-74	Filed plaintiffs motion for leave to proceed as a class and for summary judgment (with 2 copies)
7-17-74	Filed corrections to memorandum in support of plaintiffs motions for summary judgment, etc. with two copies.
8-5-74	Filed defendants notice of filing with memorandum in opposition to plaintiffs motion for summary judgment attached.
8-7-74	Filed defendants notice of motion.
8-7-74	Filed defendants motion for leave to file instanter—motion to dismiss and for summary judgment and memorandum of law in support of action.
8-8-74	Enter order dated August 7, 1974: Governments motion of defendant Caspar Weinberger for leave to file instanter his (1) motion to dismiss or for summary judgment and (2) Memorandum of law in support thereof is entered and continued to September 12, 1974 at 10:00 a.m. before Judge Marshall, Lynch, J Mailed notices 8-8-74.
8-14-74	Filed Plaintiff's notice with motion for additional time to file reply brief attached.
8-15-74	Enter order dated August 14, 1974: Enter Order on motion for additional time to file

	reply brief to September 6, 1974, granted. Lynch J. Mailed notices 8-15-74.
9-6-74	Filed Reply memorandum of the plaintiffs on cross-motions of summary judgment and defendants motions to dismiss.
9-13-74	Enter order dated September 12, 1974: Government given to and including September 23, 1974 to file reply to pending motions. Marshall, J Mailed notices 9-13-74.
9-25-74	Filed defendants notice of filing.
9-25-74	Filed defendants motion to file its reply memorandum which exceeds pages, instaner.
9-25-74	Filed defendants reply memorandum.
9-26-74	Enter order dated September 25, 1974: Order governments motion to file its reply memorandum which exceeds 15 pages, instanter and governments memorandum, granted. Marshall, J Mailed notices 9-26-74.
10-7-74	Enter order dated October 7, 1974: Enter order granting plaintiffs leave to file supplemental memorandum instanter. Marovitz, J Mailed notices 10-8-74.
10-7-74	Enter order dated October 7, 1974: Order plaintiffs motion to file supplemental memorandum instanter, granted. Marshall, J Mailed notices 10-9-74.
10-7-74	Filed plaintiffs motion; supplemental memorandum.
10-17-74	Enter order dated October 16, 1974: Plaintiffs motion to convene a three judge court is granted. Marshall, J—DRAFT Mailed notices 10-16-74.

11-29-74	Enter order dated November 25, 1974: It is hereby ORDERED that this cause is reassigned to the Calendar of the Honorable Thomas R. McMillen, Robson—for the executive committee. Mailed notices 11-29-74.
12-19-74	Filed designation of three judge court designating Wilbur F. Pell, Prentice Marshall, and Thomas R. Millen, Judges.
5-20-75	Enter order dated May 19, 1975: Oral argument will be held in the three above cases on Friday, June 27, 1975 at 2:00 p.m. in Judge McMillen's courtroom. A maximum of 45 minutes to each side will be allowed, and the attorneys for each side are requested to divide their time between the three cases as they see fit. Counsel may submit additional citation of authorities in writing not later than one week prior to the oral argument, if this is necessary to advise the court of new or overlooked decisions. However, additional briefing is not authorized, and the court will receive the citations in letter form, without argument or discussion. McMillen, J. Notices mailed 5-20-75. (in 73 C 2337)
7-2-75	Enter order dated June 27, 1975: Oral arguments heard, cause taken under advisement. Pell, CJ; Marshall, J., McMillen, J. Notices mailed 7-2-75. (in 73 C 2337)
8-5-75	Filed plaintiffs motion to alter definition of proposed class.
8-25-75	Filed defendant's notice of filing.
8-25-75	Filed defendant's motion to strike plaintiffs' motion to alter definition of the proposed class.

8-25-75	Filed Federal Defendant's supplemental memorandum in opposition to plaintiffs' motion to alter the class, and requesting dissolution of the Three Judge Court.
9-18-75	Enter order dated 9-17-75: Enter three-judge decision that the motion of the defendants to dismiss all three complaints in the cases at bar should be granted (Draft) PELL, J. MARSHALL, J McMILLEN, J. Mailed Notices 9-18-75 (JS6)
10-15-75	Filed plaintiffs' notice of appeal. (No Fee)
10-15-75	Transmitted copy of notice of appeal and copy of docket entries to U.S.C.A.—7th Circuit.
10-16-75	Mailed letter and copy of docket entries to James D. Weill, 343 S. Dearborn St. and Thomas Grippando, 64 E. Jackson and mailed copy of notice of appeal and copy of letter to William J. Scott and transmitted copy of notice of appeal and letter to U.S. Attorney.
11-6-75	Filed defendant Joel Edelman's notice; motion to dismiss appeal.
11-4-75	Filed certified copy of order from the U.S.C.A.—7th Circuit dated November 3, 1975 re: record to be filed in the Court of Appeals on or before November 12, 1975; complete record. (filed in 73 C 2337)
11-10-75	Certified and transmitted the complete record on appeal to the USCA, 7th Circuit consisting of one volume of pleadings.
11-10-75	Mailed copy of letter, list of documents and certificate to Thomas Grippando, James Weill, U.S. Attorney and William J. Scott.
7-7-76	Certified and transmitted supplemental record to U.S.C.A. 7th Circuit consisting

	of copy of supplemental memorandum of Federal Defendants filed on August 25, 1975.
10-20-76	Filed opinion. (IN 73 C 2337) JS-5
10-20-76	Filed certified copy of Order from U.S.C.A. 7th Circuit dated September 28, 1976 that the judgment of the U.S. District Court is Reversed In Part and Dismissed in Part. (IN 73 C 2337)
10-20-76	Received complete record from the U.S.C.A. 7th Circuit consisting of 1 volume pleadings.
2-18-77	Filed certified copy of amended judgment from U.S.C.A.: It is ordered and adjudged that judgment in these causes appealed from be, and the same is hereby reversed in part, dismissed in part and remanded to a single judge district court pursuant to Circuit Rule 18, in accordance with the opinion of this Court filed this date.
2-18-77	Mailed letter re District Courts General Rule 44 to attorneys of record.
3-16-77	Enter order dated 3-11-77: It appearing that this cause is related to 73 C 2337 which was remanded from the Court of Appeals with this cause; and it further appearing that that cause was reassigned to the Honorable Joel M. Flaum; IT IS HEREBY ORDERED that this case be reassigned to the Honorable Joel M. Flaum.—FOR THE EXECUTIVE COMMITTEE, Parson, CJ Mailed notices 3-16-77 (REASSIGNED TO JUDGE FLAUM)
3-18-77	Enter order dated 3-17-77: On the court's own motion cause set for status report on

	March 30, 1977 at 10:00 a.m.—Flaum, J Mailed notices 3-18-77
3-31-77	Enter order dated 3-30-77: Status heard. Cause continued for further report on status to April 20, 1977 at 10:00 a.m. The court directs that any supplemental briefs in support of counsel's renewed motions for summary judgment shall be filed by that date. Flaum, J Mailed notices 3-31-77
4-20-77	Filed plaintiffs' notice of motion; motion for extension of time to file supplemental memorandum.
4-25-77	Enter order dated 4-20-77: Status heard. Cause continued for further report on status to May 2, 1977 at 10:00 a.m.—Flaum, J Mailed notices 4-26-77
4-26-77	Enter order dated 4-20-77: Status heard. Cause continued for further report on status to May 2, 1977 at 10:00 a.m.—Flaum, J Mailed notices 4-27-77
5-17-77	Enter order dated 5-13-77: Government granted leave to proceed on the previously filed district court briefs on the renewed motions for summary judgment. Plaintiffs are given fifteen days to file their supplemental memorandum and the government is given ten days to respond. Ruling to be made by mail.—Flaum, J Mailed notices 5-17-77
5-27-77	Filed plaintiff's Motion for Certification of Class.
5-27-77	Filed plaintiff's Motion for Summary Judgment.
5-27-77	Filed Plaintiffs' Memorandum on Remand from Court of Appeals.

6-10-77	Filed federal defendants' Notice.
6-10-77	Filed Motion for leave to file Memorandum.
6-10-77	Filed Defendant's Memorandum on Remand.
6-13-77	Enter order dated June 10, 1977: Federal defendants granted leave to file memorandum, instanter.—Flaum, J Notices mailed 6-13-77
6-27-77	Enter order dated June 16, 1977 TRANSFER OF CASE TO THE EXECUTIVE COMMITTEE FOR REASSIGNMENT. The above-captioned cause is currently pending on my calendar. I recommend to the Executive Committee that this case be reassigned by lot to another judge of this Court. The reasons for my recommendations are indicated on the reverse of this form. Joal M. Flaum, Judge. (b) Order of the Executive Committee. It is hereby ordered that the Clerk of the Court reassign the above-captioned cause by lot to the calendar of an individual judge of this Court in accordance with the Rules. Enter: For the Executive Committee James B. Parsons Chief Judge 6-20-77. (JUDGE WILL). Notices mailed 6-27-77
9-29-77	Enter order dated September 28, 1977. On Court's own motion order cause for October 7, 1977 for report on status. Will, J Notices mailed 9-29-77
10-12-77	Enter order dated October 7, 1977: Order cause set for November 18, 1977 for ruling on pending motions. Will, J. Notices mailed 10-12-77

11-3-77	Order cause reassigned to JUDGE BUA (DRAFT)—The Executive Committee
11-29-77	Enter order dated November 28, 1977: Cause having been reassigned to the calendar of Judge Bua, status hearing is set for December 23, 1977 at 2:30 p.m.—Bua, J Notices mailed 11-29-77
12-27-77	Enter order dated December 23, 1977: Status hearing held. Court will rule by mail on pending motions for summary judgment and to certify class.—Bua, J Notices mailed 12-27-77
5-17-79	Enter order dated 5-16-79: Both parties are hereby directed to file supplemental briefs, simultaneously on or before May 31, 1979. Bua, J Notices mailed 5-17-79
6-1-79	Filed 5-30-79 Defendant's Supplemental Memorandum on Remand from Court of Appeals.
6-4-79	Filed 5-31-79 Plaintiffs' Supplemental Memorandum on Remand.
6-4-79	Filed 5-31-79 Excerpts from Plaintiffs' Brief in the 7th Circuit Court of Appeals.
10-12-79	Enter order dated 10-10-79: Plaintiffs' Motion for Class Certification is granted. The class shall consist of: all persons residing in HEW Region V who have been terminated from benefits under Title XVI, or who have applied for Supplemental Security Income benefits under Title XVI and have been denied such benefits, on or after January 1, 1974, solely because they are between the ages of 21 and 65 and hospitalized in a public mental institution.—Bua, J. Notices mailed 10-12-79

10-15-79	Enter order dated 10-10-79: The WILSON plaintiffs' (73 C 3070) motion for summary judgment is granted. The defendant shall begin payments under the Act to all eligible inmates of public mental health institutions. The STERLING defendants' motion (73 C 2337) for summary judgment is granted; the exclusion of pretrial detainees from SSI benefits is sustained, and the STERLING action is dismissed (DRAFT).—Bua, J. Notices mailed 10-15-79
10-22-79	Filed 10-19-79 Plaintiff's Notice of Filing; Motion for Entry of Final Judgment Order or Alternatively to Alter or Amend the Judgment.
11-6-79	Enter order dated 11-5-79: Defendant to file answer to plaintiff's motion for entry of final judgment order or alternatively to alter or amend the judgment by or on 11-15-79. Plaintiffs' reply to be filed by or on 11-23-79. Court will rule by mail.—Bua, J. Notices mailed 11-6-79
11-8-79	Filed 11-8-79 Defendant's Notice of Appeal to the U.S. Supreme Court from the memorandum and order entered Oct. 10, 1979.
11-8-79	Mailed copy of Notice of Appeal to Opposing Counsel, James D. Weill, Legal Assistance Foundation, 343 S. Dearborn, Chicago, ILL 60604.
11-19-79	Filed 11-16-79 Government's Notice.
11-19-79	Filed 11-16-79 Motion to Extend Time.
11-19-79	Enter order dated 11-16-79 Defendant granted an extension of time within which to file answer to plaintiff's motion for entry of final judgment to and including

	11-26-79.—Bua, J. Notices mailed 11-19-79
11-30-79	Filed 11-29-79 Defendant's Notice.
11-30-79	Filed 11-29-79 Motion for Leave to File Instanter.
11-30-79	Filed 11-29-79 Defendant's Memorandum in Opposition to Plaintiff's Motion for Entry of Final Judgment Order or Alternatively to Alter or Amend the Judgment.
11-30-79	Enter order dated 11-29-79. Defendant given leave to file memorandum in opposition to motion for entry of final judgment instanter. Parties represent to the court that they will present a stipulated order within 2 weeks.—Bua, J Notices mailed 11-30-79
12-19-79	Filed 12-18-79 Plaintiffs' Notice of Motion; Motion for Entry of Judgment.
12-19-79	Enter order dated 12-18-79: Enter judgment in favor of plaintiffs (DRAFT).—Bua, J. JS-6 Notices mailed 12-19-79

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CHARLES EDWARD WILSON, MICHAEL IRENE WELCH, MAUDIE SIMMONS, JAMES ARMSTRONG, BOMER JOHNSON, SAMUEL BIRDSELL, DONALD CLARK, JOHN KIERAN TURNEY, individually and on behalf of all others similarly, situated, PLAINTIFFS,

v.

JOEL EDELMAN, Director of the Illinois Department of Public Aid, and CASPAR WEINBERGER, Secretary of the Department of Health, Education and Welfare, DEFENDANTS.

NO: 73 C 3070

AMENDED COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

COUNT I

1. This is an action for declaratory and injunctive relief against JOEL EDELMAN, Director of the Illinois Department of Public Aid, authorized by 42 U.S.C. §1983 and 28 U.S.C. §2201, 2202 to secure rights, privileges and immunities established by the Constitution and laws of the United States. Plaintiffs bring this action individually and on behalf of all other persons who are hospitalized in a mental institution and who are otherwise eligible for public assistance pursuant to Chapter 23, §3-1 *et seq.* of the Illinois Revised Statutes under the program of Aid to the Aged, Blind and Disabled, but are denied said assistance solely because of their hospitalization in a public mental institution. Plaintiffs challenge the constitutionality of Chapter 23, §3-14 Ill. Rev. Stat. and regulations promul-

aged thereunder which prohibit said assistance to persons hospitalized in mental hospitals.

2. Jurisdiction is conferred upon the Court by 28 U.S.C. §1343(3) and (4) providing for jurisdiction of suits authorized by 42 U.S.C. §1983, and by 28 U.S.C. §1331 in that the amount in controversy exceeds $10,000, exclusive of interest and costs.

3. This is a proper case for determination by a three-judge court pursuant to 28 U.S.C. §2281, since plaintiffs seek an injunction to restrain the defendant EDELMAN who is a state officer from the enforcement, operation, and execution of a state statute and regulation of statewide applicability on the ground that said statute and regulation are contrary to the Constitution of the United States.

4. Plaintiffs are all citizens of the United States and residents of the State of Illinois, County of Cook:

a. Plaintiff Charles Wilson was admitted to Elgin Mental Health Center in October, 1973.

b. Plaintiff Michael Irene Welch was formerly a recipient of disability assistance until her admission to the Chicago Read Mental Health Center in October, 1973. The admission of plaintiff Welch in October, 1973, was the third time she had been admitted to a public mental hospital. Plaintiff Welch was released from the Chicago Read Mental Health Center in January, 1974.

c. Plaintiff Maudie Simmons was formerly a recipient of public assistance until her admission to Chicago Read Mental Health Center on February 27, 1974.

d. Plaintiff James Armstrong was formerly a recipient of disability assistance until his admission to Chicago Read Mental Health Center on October 15, 1973.

e. Plaintiff Bomer Johnson was formerly a recipient of disability assistance until his admission to Chicago Read Mental Health Center on November 16, 1973.

f. Plaintiff Samuel Birdsell was formerly a recipient of disability assistance until his admission to Chicago Read Mental Health Center on December 11, 1973.

g. Plaintiff Donald Clark was formerly a recipient of disability assistance until his admission to Chicago Read Mental Health Center on January 1, 1974.

h. Plaintiff John Kieran Turney was formerly a recipient of disability assistance until his admission to Chicago Read Mental Health Center in January, 1974.

5. The defendant, JOEL EDELMAN, is Director of the Illinois Department of Public Aid and is charged with the state-wide administration of the public assistance programs and with establishing regulations to carry out the statutory provisions with respect to those programs. He is sued in his individual capacity and as Director of the Illinois Department of Public Aid.

6. Chapter 23, §3-1.4 Illinois Revised Statutes provides that inmates of municipal, country, state or national institutions for the mentally ill are not entitled to disability assistance while they are patients in the institituion. Illinois Department of Public Aid Categorical Assistance Manual §IV-10-8 provides that persons in state institutions are not eligible for public assistance.

7. The named plaintiffs bring this action individually and pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of all persons in Illinois who are otherwise eligible for Aid to the Disabled pursuant to Chapter 23, §3-1 *et seq.*, Ill. Rev. Stat., but are denied such assistance because they are hospitalized in a public mental institution. The class is so numerous as to make joinder impracticable; there are questions of law presented herein which are common to the entire class of persons represented by plaintiffs herein; plaintiffs' claims as hereinafter set forth are typical of the claims of all of the members of the class; and plaintiffs are qualified to, and will fairly and adequately protect the interests of each and all of the members of the class. In addition, the defendant has acted or refused to act on grounds generally applicable to the class as a whole, and final declaratory and injunctive relief with respect to the class as a whole is therefore appropriate.

8. Plaintiffs are adults who have been and are disabled because of their mental conditions. Although plaintiffs have voluntarily hospitalized themselves or have been ordered to be involuntarily hospitalized for indefinite periods of time by the Circuit Court of Cook County, none of the plaintiffs have been found incompetent.

9. Plaintiffs, because of their mental conditions, have been and are hospitalized in public mental institutions operated by the Illinois Department of Mental Health.

10. Plaintiffs WELCH, SIMMONS, ARMSTRONG, JOHNSON, BIRDSELL, CLARK and TURNEY were receiving disability assistance from the Illinois Department of Public Aid, pursuant to Chapter 23, §3-1 *et seq.*, Ill. Rev. Stat. and Title XVI of the Social Security Act, 42 U.S.C. §1381 *et seq.*, until they were hospitalized in Chicago Read Mental Health Center, an inpatient facility of the Illinois Department of Mental Health. They would have continued to be eligible for such assistance but for the discrimination complained of herein.

11. At the time of their hospitalizations, during the months of October, 1973, through February, 1974, defendant EDELMAN terminated their disability assistance, due solely to the hospitalizations. In some instances this termination was effected without prior notice and hearing.

12. Plaintiff WILSON was not receiving disability assistance prior to his hospitalization in Elgin Mental Health Center, but would have been and would be eligible for disability assistance but for the discrimination complained of herein.

13. Plaintiffs are unable to earn money in the mental institutions and are indigent.

14. Disability assistance recipients receive not only assistance grants for food and shelter, but also grants for other basic needs, including clothing, transportation and personal essentials.

15. The Department of Mental Health permits those who are hospitalized to wear their own clothing. Those

who do not have their own clothing are issued hospital gowns or clothing which is often used and illfitting.

16. Those plaintiffs formerly receiving assistance received money for clothing in their assistance grants.

17. Plaintiffs would currently be eligible for grants for clothing, but for the discrimination complained of herein. Because plaintiffs cannot obtain assistance and are indigent, as their clothing wears out they will be unable to purchase clothing and must wear hospital-issued clothing.

18. Those plaintiffs formerly receiving assistance received money for personal essentials in their assistance grants.

19. Plaintiffs would currently be eligible to receive grants for personal essentials such as stationery, stamps, newspapers, books, magazines and personal care items, but for the discrimination complained of herein. The Department of Mental Health does not provide such items to inmates and plaintiffs, because they cannot obtain assistance and are indigent, are unable to purchase such items.

20. Those plaintiffs formerly receiving assistance received money for transportation costs in their assistance grants.

21. Plaintiffs would currently be eligible to receive grants for transportation but for the discrimination complained of herein. Although the Department of Mental Health provides patients with passes to visit friends and relatives outside of the institution, it does not provide inmates with carfare for such visits. Plaintiffs, because they cannot obtain assistance and are indigent, are unable to use passes for outside visits.

22. Because plaintiffs and those similarly situated have been and continue to be denied financial assistance under the Aid to the Disabled program, they will continue to suffer irreparable injury, loss and damage through the lack of adequate funds to purchase those necessities required for a minimum standard of decency and health, unless the defendants are permanently enjoined from denying them public assistance.

23. Needy disabled persons who in all other ways qualify for aid to the aged, blind or disabled are denied benefits solely because of the fact they are institutionalized in a public mental hospital. Needy persons who are denied benefits are indistinguishable from those who do receive benefits, except for the fact of their hospitalization in a public mental institution.

25. No adequate state justification exists for this arbitrary classification embodied in Chapter 23, §3-1.4 Illinois Revised Statutes or Section IV-10-8 Illinois Department of Public Aid Manual, and the classification hence is invalid under the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

26. The denial of aid to the disabled benefits without permitting the inmates to show that their needs are not being met by the institution constitutes a violation of the due process clause of the Fourteenth Amendment to the United States Constitution.

27. Plaintiffs have no adequate remedy at law.

WHEREFORE, plaintiffs pray on behalf of themselves and all others similarly situated that this Honorable Court:

1. Enter a declaratory judgment finding Chapter 23 § 3-1.4, Illinois Revised Statutes, and Section IV-10-8 of the Illinois Department of Public Aid Handbook, insofar as they deny assistance to persons solely because they are institutionalized in a public mental hospital, violative of the Fourteenth Amendment to the United States Constitution.

2. Enjoin the defendant from failing to provide aid to the aged, blind and disabled to those who are otherwise qualified, but who are hospitalized in public mental institutions, to the extent the facility in which they are hospitalized fails to provide all of the basic needs met by the program of Aid to the Aged, Blind or Disabled.

3. Order the defendant to make restitution to the plaintiffs and the members of the class for monies wrongfully denied them.

4. Grant any other relief it deems just and necessary, and grant plaintiffs their costs herein.

COUNT II

1. This Count is an action for declaratory and injunctive relief against CASPAR WEINBERGER, Secretary of the Department of Health, Education and Welfare. Plaintiffs bring this action individually and on behalf of all other persons who are hospitalized in a mental institution and who were otherwise entitled to Aid to the Aged, Blind and Disabled pursuant to Title XVI of the Social Security Act, 42 U.S.C. §1381 *et seq.*, as in effect prior to January 1, 1974, but were denied said assistance solely because of their hospitalization in a public mental hospital. Plaintiffs challenge the constitutionality of 42 U.S.C. §1385(a) and regulations promulgated thereunder which prohibit said assistance to persons hospitalized in mental hospitals.

2. Jurisdiction is conferred upon this Court by 5 U.S.C. §702 *et seq.*, 28 U.S.C. §§1337 and 1361, and 28 U.S.C. §1331 in that the amount in controversy exceeds $10,000, exclusive of interest and costs.

3. This is a proper case for determination by a three-judge court pursuant to 28 U.S.C. §2282, since plaintiffs seek an injunction to restrain the defendant, who is a federal officer, from the enforcement, operation and execution of a federal statute on the ground that said statute is contrary to the Constitution of the United States.

4. Plaintiffs reallege and incorporate paragraph 4 of Count I as and for paragraph 4 of this Count.

5. The defendant CASPAR WEINBERGER is the Secretary of the Department of Health, Education and Welfare and is charged with the nationwide administration of the program of Aid to the Aged, Blind and Disabled.

6. 42 U.S.C. §1335 as effective prior to January 1, 1974, provided that no person shall be eligible for assistance payments under the program of Aid to the Aged, Blind and Disabled with respect to any month throughout which such person is a patient in a public mental hospital.

7. The named plaintiffs bring this action individually and pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of all persons who are otherwise eligible for

Aid to the Aged, Blind or Disabled pursuant to Title XVI of the Social Security Act, 42 U.S.C. § 1381 *et seq.*, as in effect prior to January 1, 1974, but are denied such assistance because they are hospitalized in a public mental institution. The class is so numerous as to make joinder impracticable; there are questions of law and fact presented herein which are common to the entire class of persons represented by plaintiffs herein; plaintiffs' claims as hereinafter set forth are typical of the claims of all of the members of the class; and plaintiffs are qualified to, and will fairly and adequately protect the interests of each and all of the members of the class. In addition, the defendant has acted or refused to act on grounds generally applicable to the class as a whole, and final declaratory and injunctive relief with respect to the class as a whole is therefore appropriate.

8. Plaintiffs reallege and incorporate paragraphs 8 through 24 of Count I as and for paragraphs 8 through 24 of this Count.

25. No adequate justification exists for the arbitrary classification and the classification is invalid under the Fifth Amendment to the Constitution of the United States in that it denies equal protection rights embodied in the guaranty of due process of law.

26. The denial of Aid to the Aged, Blind and Disabled benefits without permitting inmates to show that their needs are not being met by the institution constitutes a violation of the due process clause of the Fifth Amendment to the United States Constitution.

27. Plaintiffs have no adequate remedy at law.

WHEREFORE, Plaintiffs, on behalf of themselves and all other similarly situated, pray that this Honorable Court:

1. Enter a declaratory judgment finding 42 U.S.C. § 1385, insofar as it denies assistance to persons solely because they are hospitalized in public mental institutions, violative of the Fifth Amendment of the United States Constitution.

2. Order the defendant to provide aid for the disabled to those who are otherwise qualified but are hospitalized in public mental institutions.

3. Order defendant to make restitution to the plaintiffs and the members of the class for monies wrongfully denied them.

4. Grant any other relief that it deems just and necessary, and grant plaintiffs their costs herein.

COUNT III

This Count is an action for declaratory and injunctive relief against CASPAR WEINBERGER, Secretary of the Department of Health, Education and Welfare. Plaintiffs bring this action individually and on behalf of all other persons who are hospitalized in a mental institution and who are otherwise entitled because of need to Supplemental Security Income payments of $25 each month pursuant to Title XVI of the Social Security Act, 42 U.S.C. § 1381 *et seq.*, as effective after January 1, 1974, but who are denied said assistance solely because they are over the age of 21 and under the age of 65 and hospitalized in a public mental hospital. Plaintiffs challenge the constitutionality of 42 U.S.C. § 1382(e)(1)(A) and regulations promulgated thereunder which prohibit said assistance because they are hospitalized in public mental hospitals.

2. Jurisdiction is conferred upon this Court by 5 U.S.C. § 702 *et seq.*, 28 U.S.C. §§ 1337 and 1361, and 28 U.S.C. § 1331 in that the amount in controversy exceeds $10,000, exclusive of interest and costs.

3. This is a proper case for determination by a three-judge court pursuant to 28 U.S.C. § 2282, since plaintiffs seek an injunction to restrain the defendant, who is a federal officer, from the enforcement, operation and execution of a federal statute on the ground that said statute is contrary to the Constitution of the United States.

4. Plaintiffs reallege and incorporate paragraph 4 of Count I as and for paragraph 4 of this Count.

5. The defendant CASPAR WEINBERGER is the Secretary of the Department of Health, Education and Welfare and is charged with the nationwide administration of the program of Supplemental Security Income.

6. Title XVI of the Social Security Act, 42 U.S.C. § 1381 *et seq.*, as effective January 1, 1974, creates a program entitled Supplemental Security Income for the Aged, Blind and Disabled. In large part this program replaces the former Title XVI program, Aid to the Aged, Blind and Disabled.

7. The Supplemental Security Income program, like the predecessor program, provides benefits to those aged, blind and disabled persons who meet a needs test. The program is administered and benefits are paid by the Social Security Administration. There is one level of benefits for eligible persons not residing in institutions, and a second, lower level of benefits for eligible persons residing in institutions.

8. Pursuant to 42 U.S.C. § 1382(e)(1)(A) inmates in public mental institutions who are 65 years of age or older or under 21 years of age (under 22 years of age in the case of an individual who is a patient in the hospital immediately preceding the date on which he attained the age of 21) are, if otherwise eligible, entitled to Supplemental Security Income grants, based on their age or disability, in the amount of $300 per year. Also entitled to such benefits, if they are otherwise eligible, are all aged, blind or disabled residents of nursing homes, private mental hospitals, and other institutions.

9. 42 U.S.C. § 1382 e (1)(A) provides that otherwise eligible residents of public mental hospitals, between the ages of 21 and 65, shall not be eligible for benefits in any month if throughout such month the individual is a patient in a public mental hospital.

10. The named plaintiffs bring this action individually and pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of all persons who are otherwise eligible for Supplemental Security Income pursuant to Title XVI of the Social Security Act, 42 U.S.C. § 1381 *et seq.*, as ef-

fective January 1, 1974, but are denied such assistance because they are between the ages of 21 and 65 and hospitalized in a public mental institution. The class is so numerous as to make joinder impracticable; there are questions of law and fact presented herein which are common to the entire class of persons represented by plaintiffs herein; plaintiffs' claims as hereinafter set forth are typical of the claims of all of the members of the class; and plaintiffs are qualified to, and will fairly and adequately protect the interests of each and all of the members of the class. In addition, the defendant has acted or refused to act on grounds generally applicable to the class as a whole, and final declaratory and injunctive relief with respect to the class as a whole is therefore appropriate.

11. Plaintiffs reallege and incorporate paragraphs 8 through 24 of Count I as and for paragraphs 11 through 27 of this Count.

28. No adequate justification exists for the arbitrary classification and the classification is invalid under the Fifth Amendment to the Constitution of the United States in that it denies equal protection rights embodied in the guarantee of due process of law.

29. The denial of Supplemental Security Income benefits without permitting inmates to show that their needs are not being met by the institution constitutes a violation of the due process clause of the Fifth Amendment to the United States Constitution.

30. Plaintiffs have no adequate remedy at law.

WHEREFORE, plaintiffs, on behalf of themselves and all others similarly situated, pray that this Honorable Court:

1. Enter a declaratory judgment finding 42 U.S.C. 1382e(1)(A), insofar as it denies Supplemental Security Income to persons solely because they are hospitalized in public mental institutions and are between the ages of 21 and 65, violative of the Fifth Amendment of the United States Constitution.

2. Order the defendant to provide Supplemental Security Income to those who are otherwise qualified but are hospitalized in public mental institutions and between the ages of 21 and 65.

3. Order defendant to make restitution to the plaintiffs and the members of the class for monies wrongfully denied them.

4. Grant any other relief that it deems just and necessary, and grant plaintiffs their costs herein.

/s/ _____

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

NO. 73 C 3070

CHARLES EDWARD WILSON, MICHAEL IRENE WELCH, individually and on behalf of all others similarly situated,
PLAINTIFFS

v.

JOEL EDELMAN, Director of the Illinois Department of Public Welfare, and CASPAR WEINBERGER, Secretary of the Department of Health, Education and Welfare,
DEFENDANTS

ANSWER TO AMENDED COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

1. Defendant, Caspar Weinberger, Secretary, Department of Health, Education and Welfare, submits the following answer to the complaint filed herein.

COUNT I

1-27. Defendant has insufficient information and knowledge of all allegations as same relates to Defendant, Joel Edelman, and therefore demands strict proof of all said allegations.

COUNT II

1. Defendant denies the allegations of paragraph 1 and demands strict proof of same.

2. Defendant denies the allegations of paragraph 2.

3. Defendant denies the allegations of paragraph 3 and in further answer thereto states that the nature of the relief sought and issues involved herein do not comport with the standards of the Federal statute quoted therein.

4. Defendant has no sufficient information as to the allegations of paragraph 4 and therefore demands strict proof of same.

5. Defendant admits the allegations of paragraph 5.

6. Defendant admits the allegations of paragraph 6.

7. Defendant denies each of the allegations of paragraph 7 and in further answer thereto states that the plaintiffs lack standing to bring this action, do not represent a class, and cannot fairly and accurately represent the interests of others by this action.

8-24. Defendant has no sufficient information as to the allegations of paragraphs 8 to 24 and therefore demands strict proof of same.

25. Defendant denies the allegations of paragraph 25.

26. Defendant denies the allegations of paragraph 26.

COUNT III

1. Defendant denies the allegations of paragraph 1 and demands strict proof of same.

2. Defendant denies the allegations of paragraph 2 and states that the Federal statute quoted therein does not properly confer jurisdiction on this court in the action herein.

3. Defendant denies the allegations of paragraph 3 and in further answer incorporates by reference herein its answer in paragraph 3 of Count II.

4. Defendant has no sufficient information as to the allegations of paragraph 4 and therefore demands strict proof of same.

5. Defendant admits the allegations of paragraph 5.

6-8. Defendant admits the allegations of paragraphs 6, 7 and 8.

9. Defendant denies the allegations of paragraph 9.

10. Defendant denies the allegations of paragraph 10 and in further answer incorporates by reference its answer in paragraph 7 of Count II.

11-27. Defendant has no sufficient information as to paragraphs 11-27 and therefore demands strict proof of same.

28. Defendant denies the allegations of paragraph 28.

29-30. Defendant denies the allegations of paragraphs 29 and 30.

WHEREFORE, the Defendant herein prays that this action be dismissed and taken for naught.

/s/
JAMES R. THOMPSON
United States Attorney
Northern District of Illinois
Eastern Division
219 South Dearborn Street
Room 1500
Chicago, Illinois 60604

AFFIDAVIT OF MAILING

STATE OF ILLINOIS

SS

COUNTY OF COOK

_____ being first duly sworn on oath, deposes and says that he is employed in the Office of the United States Attorney for the Northern District of Illinois; that on the ____ day of 2nd May, ____ 1974, he placed a copy of the

GOVERNMENT'S ANSWER TO AMENDED COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

in a Government franked envelope addressed to each of the following named individuals, and deposited each envelope in the United States mail chute, located in the United States Courthouse, Chicago, Illinois, on said date at the hour of about 2:00 p.m.

THOMAS GRIPPANDO
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BILL WENTZEL
Attorney General
160 North La Salle Street
Room 837
Chicago, Illinois

_____

SUBSCRIBED AND SWORN TO before me
this 2nd day of May, 1974

_____

NOTARY PUBLIC

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

NO. 73 C 3070

CHARLES EDWARD WILSON, et al., individually and on behalf of all others similarly situated, PLAINTIFFS,

v.

JOEL EDELMAN, Director of the Illinois Department of Public Aid, and CASPAR WEINBERGER, Secretary of the Department of Health, Education and Welfare, DEFENDANTS.

MOTIÓN FOR LEAVE TO PROCEED AS A CLASS AND FOR SUMMARY JUDGMENT

Plaintiffs, by their attorneys, respectfully move this court pursuant to Rule 23(a) and (b) of the Federal Rules of Civil Procedure for leave to proceed as a class.

Plaintiffs further respectfully move, pursuant to Rule 56 (a) and (c) of the Federal Rules of Civil Procedure, for summary judgment. Based on the pleadings, and on the affidavits attached to the accompanying Memorandum in Support of Plaintiffs' Motions for Summary Judgment and Declaration of Class Action and in Opposition to Defendant Edelman's Motion to Dismiss, plaintiffs submit that there is no genuine issue as to material fact and that plaintiffs are entitled to judgment as a matter of law.

One of the Attorneys for Plaintiffs

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

NO. 75 C 3070

CHARLES EDWARD WILSON, et al., individually and on behalf of all others similarly situated, PLAINTIFFS,

v.

JOSEPH CALIFANO, Secretary of the Department of Health, Education and Welfare, DEFENDANT.

MOTION FOR SUMMARY JUDGMENT

Plaintiffs, by their attorneys, respectfully renew their motion, pursuant to Rule 56(a) and (c) of the Federal Rules of Civil Procedure, for summary judgment. Based on the pleadings, and the affidavits previously filed, plaintiffs submit that there is no genuine issue as to material fact and that plaintiffs are entitled to judgment as a matter of law on Count III of the Amended Complaint. Plaintiff and members of the plaintiff class are entitled as a matter of law to have the decisions which have denied them benefits under Title XVI of the Social Security Act reversed with directions that they be paid benefits to the date of what would have been their original entitlement, but for the unconstitutional exclusion effected by 42 U.S.C. § 1382a(e)(1).

/s/ _____
One of the Attorneys for Plaintiff

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

NO. 75 C 3070

CHARLES EDWARD WILSON, et al., individually and on behalf of all others similarly situated, PLAINTIFFS,

v.

JOSEPH CALIFANO, Secretary of the Department of Health, Education and Welfare, DEFENDANT.

MOTION FOR CERTIFICATION OF CLASS

Plaintiffs, by their attorneys, hereby move pursuant to Rule 23 of the Federal Rules of Civil Procedure for an order that this proceeding be maintained as a class action on behalf of a class of: all persons residing in HEW Region V who have been terminated from benefits under Title XVI, or who have applied for Supplemental Security Income Benefits under Title XVI and been denied such benefits, on or after January 1, 1974, solely because they are between the ages of 21 and 65 and hospitalized in a public mental institution and therefore have been terminated or denied based solely on the provisions of 42 U.S.C. § 1382a(e)(1).

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT AOF ILLINOIS
EASTERN DIVISION

NO. 73 C 3070

CHARLES EDWARD WILSON, ET AL., individually and on behalf of all others similarly situated, PLAINTIFFS,

v.

JOEL EDELMAN, Director of the Illinois Department of Public Aid, and CASPAR WEINBERGER, Secretary of the Department of Health, Education, and Welfare, DEFENDANTS.

MOTION OF DEFENDANT, CASPAR WEINBERGER, TO DISMISS THE COMPLAINT; OR IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

Now comes defendant, Caspar Weinberger, Secretary of Health, Education and Welfare, by his attorney, JAMES R. THOMPSON, United States Attorney for the Northern District of Illinois and moves this Court as follows:

1. To dismiss the complaint for lack of jurisdiction pursuant to Rule 12(b) of the Federal Rules of Civil Procedure; or, in the alternative,

2. To enter summary judgment for defendants pursuant to Rule 56(b) of the Federal Rules of Civil Procedures.

JAMES R. THOMPSON
United States Attorney

Supreme Court of the United States

NO. 79-1380

PATRICIA R. HARRIS, SECRETARY OF HEALTH AND HUMAN SERVICES

APPELLANT,

v.

CHARLES EDWARD WILSON, ET AL.

APPEAL from the United States District Court for the Northern District of Illinois.

The statement of jurisdiction in this case having been submitted and considered by the Court, in this case probable jurisdiction is noted.

May 27, 1980

☆U.S. GOVERNMENT PRINTING OFFICE: 1980 324587 33

IN THE

APR 30 198

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1380

PATRICIA R. HARRIS, SECRETARY OF HEALTH, EDUCATION AND WELFARE,

Appellant,

VS.

CHARLES EDWARD WILSON, ET AL.,

Appellees.

On Appeal From The United States District Court For The Northern District Of Illinois

MOTION TO AFFIRM

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1380

PATRICIA R. HARRIS, SECRETARY OF HEALTH, EDUCATION AND WELFARE,

Appellant,

vs.

CHARLES EDWARD WILSON, ET AL.,

Appellees.

On Appeal From The United States District Court For The Northern District Of Illinois

MOTION TO AFFIRM

Appellees move that the final judgment and order of the District Court be affirmed on the ground that the court's judgment is manifestly correct and the issue raised by the appeal is so unsubstantial as not to need further argument.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions are set forth at pp. 2-3 of appellant's Jurisdictional Statement and in Appendix D thereto, with the exception of portions of section 1905(a) of the Social Security Act, 42 U.S.C. § 1396d(a), which are set out in Appendix A of this Motion to Affirm.

STATEMENT*

1. Title XVI of the Social Security Act, Supplemental Security Income ("SSI"), 42 U.S.C. § 1381 *et seq.* (1976 & Supp. II 1978) creates a comprehensive uniform "national program" of cash assistance to persons who are needy and "who have attained age 65 or are blind or disabled. . . ." 42 U.S.C. § 1381. Except those affected by the provision at issue in this case, all indigent aged, blind or disabled legal residents of the 50 states and the District of Columbia are eligible for SSI unless they leave the United States or refuse to cooperate with SSI administrators. 42 U.S.C. §§ 1381a, 1382. Included among those defined as disabled are the mentally disabled. 42 U.S.C. § 1382c(a)(3)(A); 20 C.F.R. § 416.901 *et seq.* (1979). The normal monthly payment to a non-institutionalized single aged, blind or disabled

* The Secretary of Health, Education and Welfare's Jurisdictional Statement (at 2-6) generally describes the statutory scheme. The Statement here discusses only aspects of that scheme the Secretary does not adequately describe or specifically address. It does not review the prior proceedings herein, which the Secretary's Jurisdictional Statement accurately sets forth.

individual is currently $208.20.* SOCIAL SECURITY ADMINISTRATION SSI CLAIMS MANUAL § 13127 (1979).

2. This case, however, concerns appellees' entitlement to a monthly $25 SSI payment normally made to otherwise eligible persons in medical institutions, but denied appellees because they are institutionalized in public mental hospitals and are between the ages of 21 and 64. This payment is a personal needs allowance intended for items other than medical care, food and shelter. (*See* pp. 7-8, 14-16, *infra*).

Section 1611(e)(1) of the Act, 42 U.S.C. § 1382(e)(1), effects the statutory exclusion at issue here. Jurisdictional Statement at 26a. It provides:

> (A) Except as provided in subparagraph (B) and (C), no person shall be an eligible individual or eligible spouse for purposes of this subchapter with respect to any month if throughout such month he is an inmate of a public institution.
>
> (B) In any case where an eligible individual or his eligible spouse (if any) is, throughout any month, in a hospital, extended care facility, nursing home, or intermediate care facility receiving payments (with respect to such individual or spouse) under a State plan approved under subchapter XIX of this chapter, the benefit under this subchapter for such individual for such month shall be payable (i) at a rate not in excess of $300 per year [$25/month]. . . .

The Secretary characterizes subsection (e)(1)(A) of this provision, which refers to an "inmate of a public institution," as generally excluding from the $25 monthly payment all residents of public institutions, and

* All figures used herein assume the SSI recipient has no other countable income; the SSI grant is reduced by the recipient's countable income until such income exceeds the SSI standard, at which point the individual is no longer needy within the meaning of the statute. 42 U.S.C. § 1382(a).

subsection (e)(1)(B) as then reincluding a "limited" or "narrow" class of persons. Jurisdictional Statement at 4, 8. In fact, the "reinclusion" virtually swallows the exclusion. It is more accurate to say that the statute generally entitles disabled persons in medical institutions to the $25 monthly payment, but excludes a "limited" class of such persons from these benefits. Specifically, as described below, all otherwise eligible residents of medical institutions are entitled to SSI benefits—except for appellees here, and a small number of tubercular patients.*

3. The grant of SSI eligibility to all groups of needy persons in public or private medical institutions, except appellees and a small number of tubercular patients, is a result of two factors. First, the statutory exclusion applies only to persons in *public* institutions. Second, this public institution exclusion is followed by the reinclusion of persons in public institutions and "receiving payments" under "subchapter XIX of this chapter." 42 U.S.C. § 1382(e)(1)(B). The reference is to the title establishing the Medical Assistance Program ("Medicaid"), 42 U.S.C. § 1396 *et seq.* (1976 & Supp. II 1978). Medicaid is a federal-state program on behalf of needy persons and provides vendor payments to medical professionals and, as relevant here, to virtually all public and private medical institutions.

---

* The statutory exclusion from SSI benefits at issue here also applies to needy residents of public tuberculosis hospitals under age 65. *See* 42 U.S.C. § 1396d(a). The number of persons affected by this exclusion is very small. In 1976 there were at any one time only 2,000 residents (of all ages and all incomes) of tuberculosis hospitals (public and private) in this country. U.S. DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 108 (1978). The number of such residents—many of whom (e.g. because not needy, or over 65, or in private institutions) would be unaffected by the exclusion in any event—had been dropping rapidly before 1976, *id.* at 109, and is likely to be even lower today.

(a) 42 U.S.C. § 1382(e)(1)(A) excludes from SSI benefits only residents of "public" medical institutions. Therefore, otherwise eligible inmates of private medical institutions are eligible for SSI. If the private institutions in which they reside receive Medicaid on their behalf, then these persons come within 42 U.S.C. § 1382(e)(1)(B) and receive $25/month for non-institutional personal needs. Persons residing in private institutions who do not receive Medicaid do not fall under the reduced payment provision of subparagraph (B); but they are not excluded by virtue of subparagraph (A) and therefore receive the normal $208.20 monthly payment.

(b) The statutory exclusion of SSI benefits for persons in a "public institution," 42 U.S.C. § 1382(e)(1)(A), does not apply, by virtue of 42 U.S.C. § 1382(e)(1)(B), to persons in an institution covered under Medicaid. Medicaid coverage is extremely broad. Among the types of institutional medical care specifically set out in the Medicaid statute are: in-patient hospital services, including psychiatric services in both public and private general hospitals; skilled nursing home services; in-patient hospital services and skilled nursing home services for individuals 65 years of age or over in an institution for tuberculosis or mental diseases; intermediate care facility services, including services in public institutions for the mentally retarded; and services in a psychiatric hospital for individuals under age 21. 42 U.S.C. § 1396d(a)(1), (4), (15), (16). The statute also has a residual coverage clause:

> any other medical care, and any other type of remedial care recognized under State law, specified by the Secretary. 42 U.S.C. § 1396d(a)(17).

42 U.S.C. § 1396d(a), however, goes on to exclude from coverage services for certain age groups in tubercular and psychiatric hospitals:

> except as otherwise provided in paragraph (16), [coverage of inpatient psychiatric services for individuals under age 21], *such term* ["medical assistance"] *does not include*—
>
> (A) any such payments with respect to care or services for any individual who is an inmate of a public institution (*except as a patient in a medical institution*); or
>
> (B) any such payments with respect to care or services for any *individual who has not attained 65 years* of age and who is a patient in an institution for tuberculosis or *mental diseases.** (Emphasis added.)

Thus one group of residents of tubercular and psychiatric hospitals is singled out for exclusion from Medicaid coverage. In the Medicaid program this exclusion occurs regardless of whether the hospital is public or private. Otherwise, Medicaid coverage sweeps broadly, including services in the full panoply of medical institutions.

Congress incorporated this Medicaid structure into the cash assistance SSI program, for residents of public but not private medical institutions. 42 U.S.C. § 1382(e)(1)(B). By virtue of that incorporation, appellees, who are aged 21-64 and are in public mental hospitals, have been singled out for exclusion from the benefits the SSI statute grants to all other eligible persons in medical institutions (*i.e.* private institutions not covered by Medicaid, or public or private ones covered by that program).

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* The Secretary omits these provisions from her Appendix D, which sets forth the other relevant statutory provisions. They are set forth in Appendix A hereto.

THERE IS NO SUBSTANTIAL QUESTION WARRANTING PLENARY REVIEW: THE DENIAL OF BENEFITS INVIDIOUSLY DISCRIMINATES AGAINST APPELLEES WITHOUT ANY BASIS RATIONALLY RELATED TO THE PURPOSES OF THE SSI STATUTE OR ANY LEGITIMATE GOVERNMENTAL INTEREST.

1. Central to this case is Congress' failure not only to give a reason for excluding appellees from the SSI program, but also to give any indication that it wanted to exclude, or understood that it was excluding, appellees. The Senate Finance Committee report accompanying Pub. L. No. 92-603, 86 Stat. 1329 (1972), which created the SSI program, states with respect to the $25 benefit to institutionalized persons:

> People who are residents of certain public institutions, or hospitals or nursing homes which are getting Medicaid funds, would get benefits of up to $25 a month (reduced by nonexcluded income). For these people most subsistence needs are met by the institution and *full benefits are not needed. Some payment to these people, though, would be needed* to enable them to purchase small comfort items not supplied by the institution. *No supplemental security benefits* will be paid to an individual in a *penal institution.* S.REP. NO. 1230, 92nd Cong., 2d Sess. 386 (1972) (emphasis added).

The House report is identical, except the words "No public assistance benefits . . . " are substituted for "No supplemental security benefits . . ." in the last sentence. H.R. REP. No. 231, 92d Cong., 2d Sess. 150 (1971), *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 4989, 5136. As the District Court noted, the "history reveals no articulated legislative intent to exclude [appellees] from these benefits. . . ." Jurisdictional Statement at 15a-16a.

The Secretary incorrectly paraphrases the legislative history by saying that "[t]he reason for this exclusion [of appellees] was Congress' belief that the needs of these individuals were being met by the institutions in which they resided. [Citing H.R. REP. NO. 231, *supra*.]" Jurisdictional Statement at 8. The cited report actually shows that Congress gave no indication of or reason for the total exclusion at issue, but rather was explaining the reduced $25 payment as designed to meet the personal needs of patients which were not being met by the institution. Congress expressed an intent only to exclude an inmate of "a penal institution."

Congress continues not to recognize the exclusionary effect of 42 U.S.C. § 1382(e)(1) on some residents of medical institutions. The House Ways and Means Committee recently described the law as providing that "[a] recipient's monthly SSI benefit standard is reduced to $25 for any month during all of which he is in a medical institution," without recognizing that this statement is inaccurate for the plaintiff class in this case. H.R. REP. NO. 451 (Part I), 96th Cong., 1st Sess. 55 (1979).

2. The Secretary first argues that "the statutory scheme does not classify SSI recipients on the basis of mental health." Jurisdictional Statement at 10. This statement confuses the manner in which 42 U.S.C. § 1382(e)(1) effectuates the statutory exclusion of the appellees in this case. It creates the SSI exclusion by incorporating for public medical institution patients an institutional Medicaid eligibility classification based on mental health. As discussed, *supra* pp. 5-6, Medicaid's definition of covered care includes "any" medical care, wherever rendered (including public and private medical institutions)—"except" for certain groups of in-

dividuals who are "patient[s] in an institution for tuberculosis or *mental diseases*." 42 U.S.C. § 1396d(a)(B) (emphasis added). The Secretary recognizes that Congress incorporated into the SSI statute an exclusion defined by the Medicaid statute, but essentially refuses to look behind the incorporation to give significance to the substance of the SSI exclusion.*

It is of no legal significance in identifying the nature of the discrimination that some mental patients are granted the SSI benefits denied to appellees. The fact remains that the exclusion is one of mental patients *qua* mental patients. In striking down a discrimination against some illegitimate children, this Court noted that: "It makes no difference that illegitimates are not so absolutely or broadly barred here as in *Levy* [*v. Louisiana*, 391 U.S. 68 (1978)]; the discrimination remains apparent." *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 172 (1972). *See also Mathews v. Lucas*, 427 U.S. 495, 504-505 n. 11 (1976); *Jimenez v. Weinberger*, 417 U.S. 628 (1974). In *Califano v. Goldfarb*, 430 U.S. 199 (1977) and *Frontiero v. Richardson*, 411 U.S. 677 (1973), the classifications found invalid as sex discrimination did not affect all women, but only those whose husbands

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* The Secretary's reliance on *Personnel Administrator v. Feeney*, 442 U.S. 256, 279 (1979) is therefore misplaced. *Feeney* concerned a facially gender-neutral Massachusetts statute which had only an indirect disparate effect on women, and one not excluding women *qua* women from the benefit the statute conferred. There was nothing in the legislative history indicating that Massachusetts had enacted the statute "because of," rather than merely "in spite of" its impact upon women. 442 U.S. at 279. The statutory scheme here, by reference to Medicaid, excludes appellees because of their status as mental patients in public mental institutions.

were not dependent on the women for more than half of their support.

3. While the Secretary protests that the statute does not discriminate against mental patients, she then relies on the legislative history of the Medicaid exclusion of certain mental patients and asserts that "[t]he resulting exclusion from SSI . . . is justifiable for the same reasons. . . ." Jurisdictional Statement at 15.* Congress, of course, failed to state that it was excluding appellees from SSI for any reason, much less for the same reasons it had established the Medicaid exclusion. It is illogical to assume that Congress ever took such reasons into account in enacting 42 U.S.C. § 1382(e)(1), both because of Congress' silence on the matter and because the Medicaid-excluded class is, in fact, bifurcated for SSI purposes: the private mental hospital group excluded from Medicaid is granted SSI.

It is therefore questionable whether the reasons for the Medicaid exclusion are available here for the Secretary to advance in support of the SSI classification. In reviewing provisions of the Social Security Act, as elsewhere, this Court normally will not test governmen-

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* The Medicaid restrictions on inpatient psychiatric care costs in public and private institutions have been upheld in *Legion v. Richardson*, 354 F.Supp. 456 (S.D.N.Y. 1973), *aff'd mem. sub nom. Legion v. Weinberger*, 414 U.S. 1058 (1973) (upholding Medicaid exclusion of public and private inpatient psychiatric care for persons under 65, and Medicare restrictions on inpatient psychiatric care); *Kantrowitz v. Weinberger*, 388 F.Supp. 1127 (D.D.C. 1974), *aff'd* 530 F.2d 1034 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 819 (1976); and *Woe v. Mathews*, 408 F.Supp. 419 (E.D.N.Y. 1976), *aff'd mem. sub nom. Woe v. Weinberger*, 562 F.2d 40 (2d Cir. 1977), *cert. denied*, 434 U.S. 1048 (1978) (upholding exclusion from Medicaid of institutional costs of persons 21-64 after the statute was amended, after *Legion*, *supra*, to include psychiatric hospital inpatient care for children).

tal action for fictitious purposes "or accept at face value assertions of legislative purposes when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation." *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 n.16 (1975). *See also Califano v. Goldfarb*, 430 U.S. 199, 212-13 (1977); *Califano v. Webster*, 430 U.S. 313, 317 (1977) (*per curiam*); *Eisenstadt v. Baird*, 405 U.S. 438, 448, 450 (1972); and *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973). In this case an examination of the SSI statute and the legislative history demonstrates not merely that there is no articulated or obvious purpose to the discrimination, but also that the discriminatory exclusion itself was fortuitous, the result—not apprehended by Congress—of the interaction of two complex statutes.

4. If the reasons supporting the rationality of the Medicaid exclusion are taken to be available to the Secretary, however, their constitutional sufficiency for Medicaid purposes hardly establishes that they also offer a rational basis for the SSI exclusion. The rationality of the SSI exclusion cannot be measured in the context of the Medicaid program or Congress' findings with respect to the provision of medical care, but rather must be examined in the context of the SSI program, and Congress' findings with respect to it. *See United States Department of Agriculture v. Murry*, 413 U.S. 508 (1973) (presumably valid dependency provisions in the Internal Revenue Code incorporated into a provision of the Food Stamp Act; food stamp provision unconstitutional because unrelated to Congressionally defined purpose of the Food Stamp Program); *Mathews v. Lucas*, 427 U.S. 495 (1976), and *Jimenez v. Weinberger*, 417 U.S. 628 (1974) (state laws regarding inheritance rights of illegitimate children incorporated into the Social Security

Act in determining public benefit rights; Social Security provisions unconstitutional); *Medora v. Colautti*, 602 F.2d 1149, 1153 (3rd Cir. 1979) (different welfare programs, to meet rational relationship test, "must independently assess need. . . .").

The reasons advanced for the exclusion of certain public and private mental hospital patients from Medicaid have no logical application to the exclusion of certain public mental hospital patients from SSI. Medicaid is designed to improve the state's ability to furnish medical assistance to its indigent residents. 42 U.S.C. § 1396. The Medicaid exclusion has been upheld on the basis of Congress' reluctance—expressly articulated—to fund the extremely expensive institutional costs of mental hospital medical care, when Congress regarded the provision of such care to be a traditional state function, and thought community based care to be preferable in any event. *See Legion v. Richardson*, 354 F.Supp. at 459; Jurisdictional Statement at 13-15. The refusal to subsidize certain preexisting state medical care was a rational policy judgment in a program directed at assisting the states in limited ways to provide medical care.

The purpose of the SSI program is quite different. It is a wholly federal program providing subsistence grants to individuals for *non-medical* costs on a uniform national basis. There is no Congressional finding that the provision of the $25 monthly SSI benefit to appellees would be either expensive or had been or properly should be assumed by the states. On the contrary, the cost of providing the benefit is *de minimis*, in the context of the SSI program (see pp. 18-19, *infra*). Moreover, in enacting the SSI program, Congress essentially preempted the field of income maintenance for the aged,

blind and disabled, including those residing in public and private medical institutions. Congress, recognizing that institutionalized persons are ordinarily without the funds to meet their personal needs, has not distinguished between appellees and other institutionalized persons. See pp. 7-8, *supra*. Indeed, the Secretary does not argue that appellees have less need for the $25 benefit than aged, blind and disabled persons residing in other medical institutions. Nothing in the record would, in any event, support any such contention. The Secretary argues only that it is constitutionally permissible for Congress to deny these individuals modest SSI cash assistance grants to meet essential *personal* needs because eight years previously Congress had found that their *medical* needs were being met by the institutions in which they resided.

Except as to appellees Congress has recognized and applied in the Social Security Act the logical distinction between cash grants to individuals for their non-institutional needs and payments to the states for medical institutional costs. The Medicaid exclusion of residents of private psychiatric hospitals does not cause an SSI exclusion. See p. 5, *supra*. In the Medicare and Social Security context, as well, ineligibility for inpatient psychiatric care does not trigger ineligibility for cash benefits.* Outside of the institutional context the same is

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* Medicare 42 U.S.C. § 1395 *et seq.* (1976 & Supp. II 1978) and Social Security, 42 U.S.C. § 401 *et seq.* (1976 & Supp. II 1978) are, respectively, the federal medical insurance and cash income maintenance provisions for indigent aged and disabled persons. They thus parallel, for their beneficiaries, the Medicaid medical vendor payment and SSI cash income maintenance provisions for indigent aged and disabled persons. In Medicare there are limiting rules for in-patient psychiatric hospital care in a public or private

(Footnote continued on following page)

true; not all Medicaid recipients receive SSI, and not all SSI recipients receive Medicaid. *See, e.g.*, 42 U.S.C. §§ 1396a(a)(10)(C), 1396a(f).

In *Koe v. Califano*, 573 F.2d 761 (2d Cir. 1978), plaintiffs, aged public mental hospital patients, were threatened with loss of both their Medicaid and SSI benefits because the hospital in which they resided faced loss of its accreditation.* They sued to enjoin the threatened SSI termination; the Medicaid exclusion was not challenged. The Second Circuit did not reach the merits of their claim, but nevertheless expressed unusual concern about the substance of the case:

> Plaintiffs' counsel points out that a monthly stipend of twenty-five dollars, while inconsequential to most, assumes a very different light in the eyes of an involuntarily institutionalized mental patient with no other source of income. The hospital provides food and shelter, but for plaintiffs and their counterparts it is only the SSI payments that make possible the purchase of personal items essential to any human existence transcending bare subsistence. The loss of such payments imposes a readily understandable burden; less obvious but perhaps no less significant are the uncertainty and feelings of rejection inflicted by the continuous threat of deprivation on those who have so little and are mentally ill. *Koe*, 573 F.2d at 763 n.5.

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footnote continued

hospital, principally a 190 day lifetime limitation which is not placed on non-psychiatric hospital care. 42 U.S.C. § 1395d. *See Legion v. Richardson*, 354 F.Supp. at 458. The Social Security cash payment for the individual's non-medical needs, however, is not terminated when Medicare discontinues coverage of the psychiatric hospital bill.

* Medicaid benefits to public psychiatric hospitals, while normally available on behalf of persons under 21 or over 64, depend on the accreditation of the hospital.

The Second Circuit saw no analogy to the Medicaid exclusion, even though it recognized, *id.* at 762 n.1, that it had upheld that exclusion (for patients 21-64 in mental hospitals) just eight months previously in *Woe v. Weinberger*, 562 F.2d 40 (2nd Cir. 1977), *cert. denied*, 434 U.S. 1048 (1978). *Koe* therefore implicitly recognizes that Congress' concern about directly subsidizing certain institutions through Medicaid has no bearing on the denial of SSI for patients' personal needs not met by the institution's provision for food, shelter and medical care.

The *Koe* discussion gives appropriate recognition to the crucial significance of the $25/month payment. Hypothetically, Congress might have been able to exclude all institutionalized persons from benefits, based on an assumption that such individuals had less need for SSI. But Congress did not do so.* Rather it has provided benefits for virtually all persons in private and public medical institutions, reducing the regular benefits based on a proper assumption that residents of such institutions have a lesser but still significant need for income maintenance. The institutions provide food, shelter and medical care.** The $25 monthly SSI benefit denied to appellees is critical "to take care of small personal expenses." H.R. REP. NO. 451 (Part I), 96th Cong., 1st Sess. 153 (1979). The ability to meet such expenses—for reading material, non-institutional clothing, pay phones,

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* "The Constitution imposes no obligation" to establish a public benefit program, but once the legislature "decides to alleviate some of the hardships of poverty . . . the manner in which it dispenses benefits is subject to constitutional limitations." *Maher v. Roe*, 432 U.S. 464, 469-70 (1977).

** The Secretary has defined an "institution" for purposes of the SSI program as providing "food and shelter . . . [and] some treatment or services. . . ." 20 C.F.R. § 416.231(b)(1)(1979).

cosmetics and personal toiletries—is extremely important to institutionalized persons, as Congress has recognized. Aside from making the benefit at issue here part of the SSI entitlement, Congress has provided that skilled nursing facilities and intermediate care facilities must have methods to protect patients' personal funds, 42 U.S.C. §§ 1395x(j)(14), 1396a(a)(28), 1396d(c)(4). The Secretary is required to define by regulation items covered by the personal funds of patients as opposed to costs included in institutional reimbursement. Act of Oct. 25, 1977, Pub. L. 95-142, § 21(b), 91 Stat. 1207; Act of June 13, 1978, Pub. L. 95-292, § 8(c), 92 Stat. 316. Patients in skilled nursing homes and intermediate care facilities must be allowed to have personal clothing and possessions except to the degree medically contraindicated. 42 C.F.R. §§ 405.1121(k)(13), 442.311(k), 442.404 (k) (1979).*

One commentator has described the desocialization process associated with depriving the institutional resident of personal possessions:

> One set of the individual's possessions has a special relation to self. The individual ordinarily expects to exert some control over the guise in which he appears before others. . . . For this he needs cosmetic and clothing supplies. . . . E. GOFFMAN, ASYLUMS: ESSAYS ON THE SOCIAL SITUATION OF MENTAL PATIENTS AND OTHER INMATES, 19-20 (1961).

An Illinois study has found that the length of mental hospital stay of a majority of the sample of patients was prolonged by the desocialization syndrome described by

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* HEW defines personal possessions to include "books, pictures, games, radios, arts and crafts materials, religious articles, toiletries, jewelry, and letters." 42 C.F.R. § 442.436 (1979).

Goffman. Hansell and Benson, *Interrupting Long-Term Patienthood: A Cohort Study*, ARCHIVES OF GENERAL PSYCHIATRY, March 1971, Vol. 24, p. 238.

There is nothing in the statute, its history, or the Secretary's or any court's understanding of it, which justifies any notion that the SSI exclusion is based on the same assumptions as underlie the comparable but not identical Medicaid exclusion. Bereft of such support, the Secretary asserts that the SSI link to Medicaid is related to alleged "concern that federal funds be received on behalf of [*] residents of qualified institutions," and the alleged "fact that [appellees] are not 'similarly situated' with Medicaid patients in terms of federal interest and control." Jurisdictional Statement at 6 n.7. The Secretary's justifications in fact reflect the absurdity of the exclusion. For residents in private medical institutions, including mental hospitals, SSI eligibility depends neither on the Medicaid qualifications of the institution nor the federal control inherent in institutional receipt of Medicaid funds. Moreover, Congress has required each state to establish and enforce standards (regarding, *e.g.*, safety, sanitation and civil rights) for any category of institutions in which a significant number of SSI recipients reside. 42 U.S.C. § 1382e(e)(1). This supervisory authority is triggered by SSI, not Medicaid, payments. Thus, there is no merit to the Secretary's arguments that SSI should be limited to residents of facilities otherwise meeting governmental standards in general, or Medicaid standards in particular. That is not the way the SSI statute is structured.

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* The Secretary's reference to payments on the residents' "behalf" confuses Medicaid and SSI. The SSI payment is to the individual for his personal needs, not to the institution on behalf of the person for institutional costs.

The Secretary also suggests that the statutory exclusion might be justified solely on the basis of "the conservation of federal resources." Jurisdictional Statement at 6 n.7; 7. Fiscal concerns alone are never the basis for this Court's upholding otherwise invidiously discriminatory legislation. If they were, no underinclusive classification denying public benefits would be subject to constitutional scrutiny. *Compare Califano v. Goldfarb*, 430 U.S. 199 (1977); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Jimenez v. Weinberger*, 417 U.S. 628 (1974); *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973); *United States Department of Agriculture v. Murry*, 413 U.S. 508 (1973).*

In any case, the government's fiscal interest in denying appellees a $25/month SSI grant is insubstantial. Based on the record and available data, the government's estimate of an annual cost of $95 million, Jurisdictional Statement at 7 n.8, is wildly inflated; a more accurate figure would be $6 million/year. At any given time there are 200,000 persons nationally in psychiatric hospitals. U.S. DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 108 (1978). Over half of the mentally ill in hospitals are over 64 and therefore not excluded by 42 U.S.C. § 1382(e). S. REP. NO. 416, 96th Cong., 1st Sess. 18 n.50 and surveys cited therein. There are thus fewer than 100,000 non-aged persons in mental hospitals at

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* When this Court has regarded the government's fiscal concerns as buttressing an otherwise rational basis for underinclusive classification, the classification upheld ordinarily has not involved an absolute denial of benefits, such as that at issue here, but rather has involved differences in relative benefit levels. *Compare* cases cited in text with *Dandridge v. Williams*, 397 U.S. 471 (1971); *Jefferson v. Hackney*, 406 U.S. 535 (1972). *See Medora v. Colautti*, 602 F.2d at 1153 n.9.

any given time. Since the exclusion effected by 42 U.S.C. § 1382(e) only occurs when the person is in the hospital for a full month, the number of persons situated similarly to appellees nationally cannot exceed 100,000, for a monthly cost of $2½ million. But of the 100,000, many are not excluded by the provisions at issue here because they are one or more of the following: a) in private hospitals; b) children; c) not indigent due to resources in excess of SSI limits; d) not indigent due to income in excess of SSI limits (for example, while mental inpatients normally do not have regular employment, some are insured by Social Security and have monthly income from that source); or e) in the hospital for less than a month. In the District Court plaintiffs made, based on such factors, an estimate of "at least 20,000 persons" as the number of mental inpatients excluded nationally. Memorandum in Support of Plaintiffs' Motion for Summary Judgment and Declaration of Class Action, *etc.*, at 9, filed 7/12/74. The Secretary has never disputed this estimate. 20,000 grants/month of $25 would cost the Secretary $6 million/year.*

The statutory exclusion at issue here resembles the ballot nominating statute in *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979). The discriminatory exclusion of appellees is an "historical accident," *id.* at 187. It is not the "considered product of a legislature," *id.* at 191 (Rehnquist, J., concurring); rather it is "a legislative remnant [which was] . . . a malfunction of the legislative process. . . ." *id.* at 189 (Stevens, J., concurring).

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* By comparison, the SSI program cost over $5,500,000,000 in FY 1979. Act of Oct. 18, 1978, Pub. L. No. 95-480, Title II, 92 Stat. 1581. Of the 4,235,939 SSI recipients in December, 1976, 5% (about 212,000) were receiving $25/month based on 42 U.S.C. § 1382(e)(1)(B). SOCIAL SECURITY ADMINISTRATION, ANNUAL STATISTICAL SUPPLEMENT, 1976 at 193.

In *James v. Strange*, 407 U.S. 128 (1972) this Court invalidated a state provision regarding recoupment of criminal defense costs without the exemptions normally available to judgment debtors. Unlike the exclusion in this case, the statute in *James* was judicially recognized as reflecting a valid state interest. It still could not withstand constitutional scrutiny:

> State recoupment laws, notwithstanding the state interests they may serve, need not blight in such discriminatory fashion the hopes of indigents for self-sufficiency and self-respect. The statute before [the Court] embodies elements of punitiveness and discrimination which violate the rights of citizens to equal treatment under the law. *Id.* at 141-142.

The statutory exclusion at issue here is as bizarre and thoughtless as those in *Illinois State Board of Elections* and *James*, and it violates appellees' rights under the equal protection component of the due process clause of the fifth amendment to the United States Constitution. Congress has valid interests in fiscal concerns and in limiting payments to institutionalized individuals by only providing for personal essentials. The total exclusion of appellees is, however, without any rational basis. Indeed it seems not to have been the product of any deliberate legislative decision; the legislative record suggests Congress did not recognize that appellees—as opposed to "inmates of penal institutions"—would be denied benefits.

The Secretary does not argue that appellees do not fall within this Congressional definition of need; in effect she argues only that it is permissible to penalize the individuals because Congress does not want to subsidize the institutions. This is an irrational penalty, rather than a rational basis for exclusion; it is as if Congress withheld welfare grants for food and clothing for in-

digent persons living in substandard public housing or attending segregated schools because Congress had decided not to subsidize the institutional costs of such housing or schools. *See Medora v. Colautti*, 602 F.2d at 1155 n.14 (governmental action making recipients into "hostages" is an insufficient ground for exclusion of recipients from a welfare program). Nor can the Secretary articulate any reason for the exclusion that is rationally related to the statutory purpose of meeting the essential personal needs of aged, blind and disabled persons, including those in medical institutions. The exclusion is simply an aberration which, like that in *James*, "embodies elements of punitiveness" and "blight[s] . . . the hopes of indigents for self-sufficiency and self-respect."

5. As discussed, the exclusion of appellees bears no rational relationship to any legitimate governmental purpose; the discrimination violates appellees' rights under the equal protection component of the fifth amendment due process clause under any articulation of the equal protection standard. In order to affirm summarily, this Court thus need not apply the heightened scrutiny standard the District Court used.* The District Court was, however, also correct in finding the

* Summary affirmance by this Court disposes of the precise question presented and necessarily decided in the judgment affirmed; no resolution of other matters may be inferred. *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. at 182-83, and cases cited therein. Moreover, the Rehabilitation Act of 1973, as amended, protects the mentally ill, and other handicapped persons, from discrimination in federal and federally assisted programs, 29 U.S.C. § 794, and so limits substantially the number of cases regarding discrimination against the mentally ill which might otherwise need to be decided by the courts on constitutional grounds. This makes the prospective impact of a summary affirmance here even more limited than it would be otherwise.

discrimination invalid under a heightened standard of review. That standard is substantially less rigorous than the "strict" scrutiny to which racial classifications are subject, but it does require that, to be constitutional, the legislative classification must serve "important governmental objectives and must be substantially related to the achievement of those objectives." *Craig v. Boren*, 428 U.S. 190, 197 (1976).

Mental patients have the crucial characteristics that have been the basis for heightened review of discrimination against other groups. Mental institution residents are a "discrete and insular minorit[y]," with disproportionately limited political influence. *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938). Virtually all states disenfranchise the "insane." S. BRAKEL and R. ROCK, THE MENTALLY DISABLED AND THE LAW (1971) 308, 333 (Table 9.4). While some psychiatric inpatients retain the right to vote, institutional restrictions may effectively limit the extent to which the patient can seek to influence the political process. In short, the "mentally ill constitute a minority segment of the polity which is often disenfranchised . . . and which is virtually powerless to improve its circumstances through the political process." *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1229 n.153 (1974)*

This Court has noted the stigmatization inherent in civil commitment. *Vitek v. Jones*, ... U.S. ..... , 48 L.W.

* Contrary to the Secretary's suggestion (Jurisdictional Statement at 12 n.11), the partial inclusion of mental patients in the SSI program does not show that they are not discriminated against. Nor does it indicate that their political powerlessness or stigmatization may not explain the discrimination. See pp. 9-10, *supra*. *See also Nyquist v. Mauclet*, 432 U.S. 1 (1977), and *Graham v. Richardson*, 403 U.S. 365 (1971) (discrimination against limited groups of aliens).

4317, 4320 (March 25, 1980); *Addington v. Texas*, 441 U.S. 418, 425-26 (1979). Mental hospitalization subjects a member of the group to "a stigma of inferiority and a badge of opprobrium." *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1127 (1969).

Given the political and social isolation of appellees, Congressional inattention to the SSI exclusion of mental patients is unsurprising. The unique disabilities of institutionalized persons, especially the mentally ill, however, occasionally have been the subject of Congressional attention. A recent report of the Senate Judiciary Committee described "the unique inability of institutionalized persons to assert their own rights" due to lack of awareness of rights, intellectual or emotional incapacity, conditioning to accept their institutional environments, lack of capacity to sue, physical isolation, lack of money, and complete dependence on the institutional environment. S. REP. NO. 416, 96th Cong., 1st Sess. 19-20, 27 (1979).

Sen. Long, floor manager of the original Medicaid bill, alluded to the same problems in supporting the coverage in that bill of patients aged 65 or older in psychiatric and tubercular hospitals:

> I am also particularly happy that my lengthy struggle to eliminate the archaic exclusion of Federal assistance to the mentally ill and the victims of tuberculosis has proved worthwhile.
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> * * *
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> [W]e have, at long last, removed these residual shackles from the feet of those, who, by the accident of history, have been overlooked, and left behind, because they were relatively small in numbers or could not speak for themselves. 111 CONG REC. 15037 (1965), *reprinted in* [1965] U.S. CODE CONG. & AD. NEWS, 2285, 2287.

The Secretary asserts that no special scrutiny is appropriate because mental illness relates to "ability to perform or contribute to society," citing *Frontiero v. Richardson*, 411 U.S. at 686 (plurality opinion), and *Doe v. Colautti*, 592 F.2d 704, 711 (3rd Cir. 1979). Jurisdictional Statement at 12. The plurality opinion in *Frontiero* was addressing criteria for strict scrutiny, rather than commenting on the possibility of some heightened review, short of strict scrutiny, applicable to discrimination against a politically powerless minority. *Frontiero* does not suggest the proposition that a group which meets all of the "traditional indicia of suspectness" articulated just a few weeks earlier in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), is entitled to no special judicial protection. Those indicia were that the group had been:

> . . . saddled with such disabilities, or subject to such a history of purposeful inequal treatment or relegated to such a position of political powerlessness as to command extraordinary protection. . . . 411 U.S. at 28.

Many of the groups to which this Court has given special protection do not meet all of the variously articulated criteria for triggering special scrutiny of discrimination.*

Moreover, the government has here created the SSI program in part to mitigate or compensate for the inability of the program's beneficiaries, including the

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* Women are not an insular minority. *See Frontiero*, 411 U.S. at 686 n.17. Alienage is not an "immutable characteristic determined solely by accident of birth." *Frontiero*, 411 U.S. at 686. *See Sugarman v. Dougall*, 413 U.S. 634, 657 (1973) (Rehnquist, J., dissenting). Moreover, there is increasing evidence that some forms of mental illness are genetically based, *i.e.*, accidents of birth. *See, e.g.*, MASUR AND ROBERTSON, BIOLOGY AND SOCIAL BEHAVIOR 61-62 (1972).

mentally disabled, to "perform or contribute."* Measured against this purpose, the government's contention that the mentally disabled appellees in this case should be given no special judicial protection precisely *because* of that inability is simply perverse, particularly since the statutory exclusion here may prolong or intensify the very disability triggering SSI eligibility.

To be sure, the inability of some mental patients to "perform or contribute" might well constitute a sufficient basis for a carefully honed exclusion in some contexts (e.g., voting) in which the government plausibly could assert that the inability is rationally related to the exclusion.** In this case, however, the government makes no such assertion. Nor could it. Rather, the statutory exclusion is the simple product of circumscribing a class of persons with no political power and "characterized by some unpopular trait" resulting in a "special likelihood of bias on the part of the ruling majority." *New York City Transit Authority v. Beazer*, 440 U.S. 568, 593 (1979). In such circumstances the dangers to the group are such that discriminatory legislation should be invalidated unless it is "carefully tuned to alternative considerations." *Mathews v. Lucas*, 427 U.S. at 513.

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* Mental illness generally may not be correlated with inability to perform, the Secretary's assertion notwithstanding. Jurisdictional Statement at 12. In severe manifestations, however, mental illness causes an inability to perform which, because it is disabling, triggers SSI eligibility.

** This Court occasionally has applied varying equal protection standards to discrimination against a single group depending on the context. *See Ambach v. Norwich*, 441 U.S. 68 (1979) (applying rational relationship test to exclusion of aliens).

CONCLUSION

42 U.S.C. § 1382(e)(1) denies appellees' rights under the equal protection component of the fifth amendment due process clause insofar as it excludes appellees from the $25/month SSI benefits otherwise accorded residents of medical institutions. The exclusion effected by the Social Security Act has no basis rationally related to, much less substantially furthering, any legitimate governmental interest. The District Court's judgment conflicts with no decision of this Court or any other court and should be summarily affirmed. *See Beaty v. Weinberger*, 478 F.2d 300 (5th Cir. 1973), *aff'd mem.*, 418 U.S. 901 (1974); *Griffin v. Richardson*, 346 F.Supp. 1226 (D. Md. 1972), *aff'd mem.* 409 U.S. 1069 (1972); and *Davis v. Richardson*, 342 F.Supp. 588 (D. Conn. 1972), *aff'd mem.* 409 U.S. 1069 (1972).

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APPENDIX A

Section 1905 of the Social Security Act, 42 U.S.C. § 1396d, provides in pertinent part:

For purposes of this subchapter—

(a) The term "medical assistance" means payment of part or all of the cost of the following care and services

* * *

(16) effective January 1, 1973, inpatient psychiatric hospital services for individuals under age 21, as defined in subsection (h) of this section; and

(17) any other medical care, and any other type of remedial care recognized under State law, specified by the Secretary;

except as otherwise provided in paragraph (16), such term does not include—

(A) any such payments with respect to care or services for any individual who is an inmate of a public institution (except as a patient in a medical institution); or

(B) any such payments with respect to care or services for any individual who has not attained 65 years of age and who is a patient in an institution for tuberculosis or mental diseases.

No. 79-1380

MAY 17 19

MICHAEL RODAK, JR

In the Supreme Court of the United States

OCTOBER TERM, 1979

PATRICIA R. HARRIS, SECRETARY OF HEALTH AND HUMAN SERVICES, APPELLANT

v.

CHARLES EDWARD WILSON, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

REPLY MEMORANDUM FOR THE APPELLANT

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Solicitor General
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---

1. Appellees contend (Motion to Affirm 7-8) that Congress did not realize when it enacted 42 U.S.C. 1382(e)(1) that the statute would operate to exclude from SSI benefits patients between 21 and 65 years of age in public mental institutions. But there is nothing in the legislative record that supports appellees' contention that the statute does not mean what it says or that Congress did not know what it was doing when it enacted the statute. See *Barrett* v.

United States, 423 U.S. 212, 216-217 (1976). Moreover, Congress has reviewed the Secretary's implementation of the SSI program and has amended the statute without objecting to the exclusion at issue here. See *Andrus* v. *Allard*, No. 78-740 (Nov. 27, 1979), slip op. 6.

On January 28, 1975, approximately one year after the SSI program became effective, the Senate Finance Committee directed its staff to study the implementation of the program. See Report of the Staff to the Senate Comm. on Finance, 95th Cong., 1st Sess., *The Supplemental Security Income Program* (Comm. Print 1977). There is no indication in this detailed and thorough study that the staff in any way questioned, as being contrary to Congress' intent (or as otherwise invalid), the Secretary's determination that individuals between 21 and 65 years of age in public mental institutions are ineligible for SSI benefits.

Additionally, in October 1976 Congress amended 42 U.S.C. 1382(e)(1)(A) to provide an additional exception to the exclusion of residents of public institutions from SSI benefits. Act of Oct. 20, 1976, Pub. L. No. 94-566, Title V, Section 505(a), 90 Stat. 2686. Despite the fact that appellees had brought this lawsuit challenging the statutory exclusion nearly three years earlier, Congress did not see fit to amend the statute to provide benefits to members of appellees' class.

In any event, if appellees are correct in asserting that Congress did not intend to exclude their class from the benefits of the statute, the proper remedy

would be with Congress and not the courts. See *Delaware Tribal Business Committee* v. *Weeks*, 430 U.S. 73, 90 (1977).

2. Although the Secretary initially estimated that the annual costs involved in implementing the district court's order would be $95 million nationwide (J.S. 7 n.8), more current information has been made available which indicates that the annual cost may be closer to $30 million. According to data collected by the National Institute of Mental Health (NIMH) in its annual census,[1] at the end of 1977 there were 105,789 residents of state and county mental hospitals aged 18 through 64. If all of these individuals were eligible for the $25 reduced SSI benefit,[2] the total annual cost would be in excess of $30 million.[3]

---

[1] This survey will soon be published by NIMH under the title "Estimated Resident Patients State and County Mental Hospitals, U.S., 1977."

[2] In order to be eligible for the $25 payment, an individual is required to have income and resources less than the SSI limits set by the Social Security Act and to remain in the institution for a full month. For purposes of this estimate, these facts have been assumed.

[3] While the NIMH census does not contain a breakdown indicating the number of patients of public mental institutions aged 21 through 64, the 1970 census indicates that 4% of all residents aged 18 through 64 in state, county and city mental hospitals were between 18 and 21 years of age. Assuming that this percentage remained stable, there would have been 101,557 residents aged 21 through 64 at the end of 1977. Even using this lower figure, costs would exceed $30 million annually.

Appellees have estimated the nationwide costs to be closer to $6 million (Motion to Affirm 19). The data relied on by appellees is substantially less specific than the NIMH study on which we rely. Appellees' figures are not broken down into public and private facilities and are not broken down by age. Accordingly, a number of unsubstantiated inferences must be made to use this data. For example, in determining that more than half of those in mental facilities are 65 years of age or older, appeelles have relied (Motion to Affirm 18) on data in S. Rep. No. 96-416, 96th Cong., 1st Sess. 18 n.50 (1979). That report states that according to an NIMH analysis of 1975, at any one time there are 200,000 residents of state and county facilities for the mentally ill. The report further cites a 1970 Department of Justice census revealing that 113,000 of those in facilities for the mentally ill are 65 or older. Using these two statistics, appellees state that over half of the mentally ill in mental hospitals are at least 65 years old and thus not subject to the exclusion of 42 U.S.C. 1382 (e). We submit that these two statistics, which deal with different universes of individuals, cannot be meaningfully compared. Moreover, the statistics relate to two periods five years apart. Notably, during this five-year period, the total number of residents in mental institutions steadily decreased. Thus, the figures cited by appellees are not sufficiently reliable to serve as a basis for gauging the impact of the district court's ruling.

Finally, even assuming the accuracy of appellees' figures, $6 million per year is not an "insubstantial" sum (Motion to Affirm 18). The government has a legitimate interest in reversal of the judgment below to prevent an unwarranted drain on the limited funds allocated by Congress for social benefit programs such as SSI.

For the reasons stated above and in the jurisdictional statement, it is respectfully submitted that probable jurisdiction should be noted.

WADE H. MCCREE, JR.
Solicitor General

MAY 1980

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BRIEF FOR THE APPELLANT

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v.

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BRIEF FOR THE APPELLANT

QUESTION PRESENTED

Whether Section 1611(e)(1)(A)-(B) of the Social Security Act violates the Due Process Clause of the Fifth Amendment by excluding from eligibility for Supplemental Security Income public assistance benefits persons otherwise eligible who are residents of public institutions and whose treatment is not funded by the federal government under the Medicaid program.

* In addition to appellee Wilson, the following individuals were named as plaintiffs in the amended complaint (see J.A. 14, 15-16): Michael Irene Welch, Maudie Simmons, James Armstrong, Bomer Johnson, Samuel Birdsell, Donald Clark and John Kieran Turney. The district court also certified this case as a class action. See note 7, *infra*.

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OPINION BELOW

The opinion of the district court (J.S. App. 1a–20a) is reported at 478 F.Supp. 1046.

JURISDICTION

The order of the district court (J.S. App. 1a–20a) was entered on October 10, 1979. A notice of appeal was filed on November 8, 1979 (J.S. App. 24a–25a).[1] On December 28, 1979, Mr. Justice Stevens extended the time for docketing the appeal to and including March 7, 1980, and the jurisdictional statement was filed on that date. The Court noted probable jurisdiction on May 27, 1980. The jurisdiction of this Court rests on 28 U.S.C. 1252. *Williams* v. *Zbaraz,* No. 79–4 (June 30, 1980), slip op. 7–9.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the Constitution provides in pertinent part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.

2. Section 1611 of the Social Security Act, 42 U.S.C. 1382, provides in pertinent part:

---

[1] The judgment of the district court (J.S. App. 21a–23a) was entered on December 19, 1979, after the filing of the Secretary's notice of appeal from the district court's order. The filing of the notice of appeal was authorized by 28 U.S.C. 1252, which provides for direct appeal to this Court from "an interlocutory or final judgment, decree or *order* of any court of the United States * * * holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party" (emphasis added). Cf. Fed. R. App. P. 4(a)(2) ("* * * a notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after such entry and on the day thereof").

(a)(1) Each aged, blind, or disabled individual [who meets applicable income and resources requirements] shall be an eligible individual for purposes of this subchapter.

* * * * *

(e)(1)(A) Except as provided in subparagraph (B) and (C), no person shall be an eligible individual or eligible spouse for purposes of this subchapter with respect to any month if throughout such month he is an inmate of a public institution.

(B) In any case where an eligible individual or his eligible spouse (if any) is, throughout any month, in a hospital, extended care facility, nursing home, or intermediate care facility receiving payments (with respect to such individual or spouse) under a State plan approved under subchapter XIX [the Medicaid provisions] of this chapter, the benefit under this subchapter for such individual for such month shall be payable—

(i) at a rate not in excess of $300 per year (reduced by the amount of any income not excluded pursuant to section 1382a(b) of this title) in the case of an individual who does not have an eligible spouse;

(ii) in the case of an individual who has an eligible spouse, if only one of them is in such a hospital, home or facility throughout such month, at a rate not in excess of the sum of—

(I) the rate of $300 per year (reduced by the amount of any income, not excluded pursuant to section 1382a(b) of this title, of the one who is in such hospital, home, or facility), and

(II) the applicable rate specified in subsection (b)(1) of this section (reduced by the amount of any income, not excluded pursuant to section 1382a(b) of this title, of the other); and

(iii) at a rate not in excess of $600 per year (reduced by the amount of any income not excluded pursuant to section 1382a(b) of this title) in the case of an individual who has an eligible spouse, if both of them are in such a hospital, home, or facility throughout such month.

3. Section 1905 of the Act, 42 U.S.C. 1396d, provides in pertinent part:

For purposes of this subchapter—

(a) The term "medical assistance" means payment of part or all of the cost of the following care and services * * *

* * * * *

(1) inpatient hospital services (other than services in an institution for tuberculosis or mental diseases); * * *

(4)(A) skilled nursing facility services (other than services in an institution for tuberculosis or mental diseases) for individuals 21 years of age or older * * *;

* * * * *

(14) inpatient hospital services, skilled nursing facility services, and intermediate care facility services for individuals 65 years of age or over in an institution for tuberculosis or mental diseases;

(15) intermediate care facility services (other than such services in an institution for tuberculosis or mental diseases) for individuals who are

determined, in accordance with section 1396a(a)(31)(A) of this title, to be in need of such care;

(16) effective January 1, 1973, inpatient psychiatric hospital services for individuals under age 21, as defined in subsection (h) of this section; and

(17) any other medical care, and any other type of remedial care recognized under State law, specified by the Secretary;

except as otherwise provided in paragraph (16), such term does not include—

(A) any such payments with respect to care or services for any individual who is an inmate of a public institution (except as a patient in a medical institution); or

(B) any such payments with respect to care or services for any individual who has not attained 65 years of age and who is a patient in an institution for tuberculosis or mental diseases.

STATEMENT

1. In 1965, Congress enacted Title XIX of the Social Security Act, 42 U.S.C. 1396 *et seq.*, which established a medical assistance program, commonly known as "Medicaid," under which the federal government provides financial assistance to states that choose to reimburse certain costs of medical treatment for needy persons. See *Harris* v. *McRae,* No. 79–1268 (June 30, 1980), slip op. 1–2; *Beal* v. *Doe,* 432 U.S. 438, 440–441 (1977). Although participation in the Medicaid program is entirely optional, once a state elects to participate, it must comply with the requirements of Title XIX. One such requirement is that a participating state must provide financial assistance for the treatment of "categorically needy" [2] individuals

with respect to five general areas of medical care: (1) inpatient hospital services; (2, outpatient hospital services; (3) other laboratory and X–ray services; (4) skilled nursing home services, periodic screening and diagnosis of children, and family planning services; and (5) physicians' services. 42 U.S.C. 1396a (a)(13)(B), 1396d(a)(1)–(5).

The Medicaid program thus generally provides for coverage of inpatient and outpatient treatment for both physical and mental illnesses. Title XIX, however, specifically excludes from coverage under Medicaid the cost of services provided to individuals between the ages of 21 and 64 in an institution for treatment of tuberculosis or mental diseases. 42 U.S.C. 1396d(a)(1), (4)(A), (14), (15), (16), (17)(B).[3]

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[2] The Medicaid program identifies two groups of needy persons. The "categorically needy" include families with dependent children who are receiving public assistance under the Aid to Families with Dependent Children Program, 42 U.S.C. 601 *et seq.*, and the aged, blind and disabled who are receiving benefits under the Supplemental Security Income (SSI) program, 42 U.S.C. 1381 *et seq.* See 42 U.S.C. 1396a(a)(10)(A). The "medically needy" include persons who would be eligible for AFDC or SSI payments if they did not have income or resources in excess of the statutory standards and who have insufficient income and resources to pay for necessary medical care. See 42 U.S.C. 1396a(a)(10)(C). Participating states are not required to extend Medicaid coverage to the medically needy. If a state elects to include the medically needy in its Medicaid plan, it has the option of providing somewhat different coverage from that required for the categorically needy. See 42 U.S.C. 1396a(a)(13)(C). See *Harris* v. *McRae*, *supra*, slip op. 2 n.1; *Beal* v. *Doe*, *supra*, 432 U.S. at 440–441 n.1.

[3] As originally enacted, Title XIX excluded from Medicaid coverage services provided to all persons under 65 years of age in an institution for tuberculosis or mental diseases. In 1972, however, Congress amended Title XIX to extend coverage to persons under age 21 who are inpatients in an accredited psychiatric hospital receiving active treatment that has been certified as necessary and reasonably likely to improve the patient's condition. See 42 U.S.C. 1396d(a)(16), (h).

Title XVI of the Social Security Act, 42 U.S.C. 1381 *et seq.*, which became effective on Jan. 1, 1974, established the Supplemental Security Income (SSI) program, which provides monthly federal cash assistance to needy aged, blind and disabled persons. Title XVI replaced several cooperative federal-state financial aid programs with a single, uniform system of welfare benefits administered by the Social Security Administration of the Department of Health and Human Services (formerly the Department of Health, Education, and Welfare). See *Califano* v. *Aznavorian*, 439 U.S. 170, 171 (1978); *Califano* v. *Torres*, 435 U.S. 1, 2 (1978). In order to be eligible for SSI benefits, an individual must be a resident of the United States, satisfy certain income and resource standards, and be at least 65 years old or meet statutory definitions of blindness or disability. See 42 U.S.C. 1382a, 1382b, 1382c(a). Under the statute, a person is considered disabled "if he is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment * * *." 42 U.S.C. 1382c(3)(A).

Section 1611(e)(1)(A) of the Act, 42 U.S.C. 1382(e)(1)(A), provides that no person shall be eligible for SSI benefits in any month "if throughout such month he is an inmate of a public institution." [4] The statute, however, contains a limited

[4] The Secretary has defined "institution" as "an establishment which furnishes * * * food and shelter to four or more persons unrelated to the proprietor and, in addition, provides some treatment or services which meet some need beyond the basic provision of food and shelter." 20 C.F.R. 416.231(b)(1). A "public institution" is one that is either the responsibility of, or administered by, a governmental unit. 20 C.F.R. 416.231(b)(2). An "inmate" of a public institution is an individual "who is living in a public institution and receiving treatment and/or services which are ap-

exception to this blanket exclusion. An otherwise eligible inmate in a public health care institution may receive SSI benefits of up to $25 per month if the institution is receiving Medicaid payments on the inmate's account under an approved state plan. 42 U.S.C. 1382(e)(1)(B). The effect of the statute is to deny SSI payments to all residents of public institutions whose care, for whatever reason, is not funded under Medicaid. Because of their exclusion from coverage under the Medicaid program, persons between 21 and 64 years of age in public mental institutions are not eligible to receive SSI benefits.

2. Appellees are indigent residents of the United States between the ages of 21 and 64 who are disabled due to mental impairment. They thus satisfy the general eligibility requirements under the SSI program. As a result of their hospitalization in public mental institutions, however, appellees, by operation of Section 1611(e)(1)(A)–(B) of the Act, are not entitled to receive SSI benefits. Appellees do not receive full SSI benefits because they are inmates of a public institution, and they do not receive the reduced $25 monthly SSI payment because their treatment for mental illness is not being paid for under the Medicaid program.[5]

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propriate to the person's requirements." 20 C.F.R. 416.231(b)(3). See *Baur* v. *Mathews*, 578 F.2d 228, 232 (9th Cir. 1978).

In 1976, Congress amended Section 1611(e) to provide that the term "public institution" does not include a publicly operated community residence serving no more than 16 residents. 42 U.S.C. 1382(e)(1)(C). See 20 C.F.R. 416.231(b)(6).

[5] Two of the appellees, Simmons and Turney, received benefits under the SSI program until their admission to public mental institutions, at which point their benefits terminated (J.A. 15, 16). The remaining named appellees were admitted to public mental hospitals prior to the effective date of SSI.

Appellees filed this class action in the United States District Court for the Northern District of Illinois, challenging the constitutionality of Section 1611(e)(1)(A)–(B) of the Act on the ground that their exclusion from the $25 monthly SSI benefit violates the equal protection component of the Due Process Clause of the Fifth Amendment (J.A. 14–25).[6] The district court certified the case as a class action (J.S. App. 21a)[7] and granted appellees' motion for summary judgment, holding that Section 1611(e)(1)(A)–

[6] In their complaint, appellees sought declaratory, monetary, and injunctive relief against both the federal government and the State of Illinois, claiming that, in addition to Section 1611(e), various other state and federal statutory provisions concerning aid to the aged, blind and disabled that had been in effect prior to the effective date of SSI were unconstitutional (J.A. 14–25). A three-judge district court denied class certification and dismissed appellees' claims against the Secretary for lack of jurisdiction on the ground that appellees had failed to exhaust their administrative remedies. The claim against the State was denied on substantive grounds. On appeal, the court of appeals held that the Secretary had waived the exhaustion requirement and that the district court had jurisdiction over appellees' claims against the federal government under 42 U.S.C. 1383(c)(3). It therefore remanded for consideration of appellees' motion for class certification and their claim for declaratory relief. *Wilson* v. *Edelman*, 542 F.2d 1260, 1269–1275 (7th Cir. 1976). The appeal from the order of the district court sustaining the constitutionality of the Illinois statute was dismissed for lack of jurisdiction. *Id.* at 1275–1282.

[7] The class was defined as (J.S. App. 21a):

> all persons residing in HEW Region V who have been terminated from benefits under Title XVI, or who have applied for Supplemental Security Income benefits under Title XVI and have been denied such benefits, on or after January 1, 1974, solely because they are between the ages of 21 and 65 and hospitalized in a public mental institution.

HEW Region V includes the States of Illinois, Indiana, Michigan, Minnesota, Ohio and Wisconsin.

(B) of the Act is unconstitutional insofar as it excludes appellees from receiving SSI benefits solely because of their status as inmates of public mental health institutions (J.S. App. 1a–20a).

The district court first determined that Section 1611(e)(1), read in conjunction with the provisions of Title XIX that it incorporates by reference, excludes certain otherwise eligible persons from the $25 per month SSI payment on the basis of three factors: "(1) age and (2) residence in a public, (3) mental health hospital" (J.S. App. 6a). As to the first two factors, age and residence in a public institution, the court ruled that the statutory classification has a rational basis and is therefore constitutional (*id.* at 7a–8a). The court concluded, however, that the third factor—residence in a mental hospital—amounts to a classification on the basis of mental health (*id.* at 8a). It then found that mental health classifications are sufficiently like classifications based on race and national origin to require a higher standard of judicial scrutiny than is normally applicable in reviewing social welfare legislation (*id.* at 9a–15a). In particular, the court ruled that mental health classifications "must serve important governmental interests and must be substantially related to achievement of those objectives" (*id.* at 17a, quoting *Califano* v. *Webster*, 430 U.S. 313, 316–317 (1977)).

Applying this standard to the classification in the present statute, the court held that the governmental interests served by the classification "are not of sufficient importance to sustain the exclusion of" members of appellees' class (J.S. App. 17a). The court rejected the argument that the statute is a proper limitation on federal expenditures, concluding that "government may not limit[] its expenditures by making invidious distinctions between classes of its citi-

zens" (*id.* at 16a). Moreover, the court found "similarly unconvincing" the other reasons advanced in support of Section 1611(e)'s incorporation of the Medicaid scheme to determine eligibility for SSI payments (J.S. App. 16a–17a):

> The Medicaid statute provides payments to institutions to meet the subsistence needs of eligible individuals. The SSI statute provides supplemental income to the residents of Medicaid-eligible public institutions so that they may purchase personal items. Aged, blind, and disabled residents of public mental health hospitals are equally in need of this monthly stipend—the source of their subsistence payment bears no relation to their need for supplementary income.

Finally, the court observed that "[t]he exclusion appears to have been an accidental byproduct of the legislative scheme rather than an intended means of achieving a calculated legislative objective" (*id.* at 17a).

SUMMARY OF ARGUMENT

The district court held Section 1611(e) of the Social Security Act unconstitutional because it concluded that the statute invidiously discriminates against the mentally ill, that classifications based on mental illness are sufficiently similar to "suspect" classifications such as race and national origin to require heightened judicial scrutiny, and that the statute failed to pass muster under this heightened standard. The decision below is incorrect because its basic premise is flawed: the statute does not create a classification based on mental health.

1. It is difficult, if not impossible, to reconcile the district court's conclusion that the statute discriminates against the mentally ill with the fact that appellees and other individuals who are mentally disabled are eligible for SSI benefits

in the first instance *because* of their mental conditions. Appellees are excluded from SSI benefits by virtue of the incorporation of the Medicaid eligibility provisions into Section 1611(e). But neither the Medicaid statute nor Section 1611(e) classifies on the basis of mental health. So long as they are otherwise eligible, numerous categories of mentally disabled persons are covered under Medicaid and therefore qualify for SSI payments under Section 1611(e). Conversely, large numbers of otherwise eligible persons in public institutions are not covered by Medicaid and are thus denied SSI benefits for reasons wholly unrelated to their mental health status. Both Section 1611(e) and the Medicaid statute are facially neutral with respect to mental health, and there is no evidence that Congress was motivated by a feeling of antipathy toward the mentally ill when it created the statutory classification.

The classification by which appellees are ineligible for SSI benefits under Section 1611(e) is predicated not on mental health but on age and residence in a public mental institution. Neither factor defines a class that is deserving of strict or "middle-tier" scrutiny for purposes of equal protection analysis.

It is settled that a classification based on age is valid if it has some rational relationship to a legitimate governmental interest. See *Vance* v. *Bradley*, 440 U.S. 93 (1979); *Massachusetts Bd. of Retirement* v. *Murgia*, 427 U.S. 307 (1976). Moreover, a classification based on residence in a public mental institution need not satisfy a heightened standard of review. Appellees' presence in mental hospitals, unlike race or national origin, is not an immutable characteristic determined solely by accident of birth. And, while it may well be that members of appellees' class have limited political influence as the result of the disenfranchisement of

most mental institution residents, that disenfranchisement, as appellees concede, is based not on societal prejudice but on factors directly related to their ability to participate in and contribute to society. In addition, concerned individuals or organized interest groups often step forward to protect the interests of mental institution residents.

In order to pass muster on equal protection grounds, therefore, the classification enacted in Section 1611(e) need only be shown to have some rational basis.

2. Section 1611(e) satisfies the rational basis test. The statutory classification is rationally related to the legitimate goal of conserving federal resources by providing a small personal needs allowance only to those public institution residents for whom the federal government has already undertaken partial financial responsibility, while leaving to the states and local governments the responsibility of providing for the needs of other public institution residents whose care and treatment are being fully assumed by those governmental units.

Appellees do not directly challenge the congressional decision generally to exclude public institution inmates from the SSI program, nor do they contest the decision to provide a $25 monthly SSI allowance to public institution residents whose treatment is covered by Medicaid. Appellees also do not argue that Congress improperly excluded from coverage under Medicaid the treatment of persons between 21 and 64 years of age in mental institutions. Rather, appellees' contention is simply that it is somehow unfair to deny them SSI benefits on the ground that their institutionalized treatment is not funded under Medicaid. But this contention is equally available to *any* otherwise eligible resident of a public institution who is denied SSI payments because he is not entitled to Medicaid benefits.

The Due Process Clause, however, does not prohibit Congress from choosing to extend SSI benefits to institutionalized inmates "one step at a time" (*Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489 (1955)) and from "concentrat[ing] limited funds where the need is likely to be greatest." *Califano* v. *Boles*, 443 U.S. 282, 296 (1979). Here, Congress determined to provide a personal needs allowance under SSI only to those public institution residents whose institutional expenses are already being assumed by the federal government under the Medicaid program. General rules of this sort are rational "even though such rules inevitably produce seemingly arbitrary consequences in some individual cases." *Califano* v. *Jobst*, 434 U.S. 47, 53 (1977).

3. A central theme underlying appellees' arguments and the district court's opinion is that the statute may have been "an accidental byproduct of the legislative scheme rather than an intended means of achieving a calculated legislative objective" (J.S. App. 17a). The legislative record, however, clearly demonstrates that Congress knew what it was doing when it enacted Section 1611(e).

The committee reports of both Houses of Congress specifically state that SSI benefits would be provided only to people "who are residents of *certain* public institutions, or hospitals or nursing homes *which are getting Medicaid funds* * * *." S. Rep. No. 92–1230, 92 Cong., 2d Sess. 386 (1972); H.R. Rep. No. 92–231, 92 Cong., 1st Sess. 150 (1971) (emphasis added). The clear implication is that residents of certain other public facilities that are not receiving Medicaid funds would not qualify for SSI benefits. Moreover, as part of the same bill that created the SSI program Congress amended Title XIX of the Act to extend Medicaid coverage to persons under 21 years of age, but rejected an amendment to establish demonstration projects for the purpose of determining the feasibility of extending Medicaid coverage to persons

between the ages of 21 and 64 in mental hospitals. During the hearings on the amendments to the Social Security Act, several witnesses specifically pointed out that proposed Section 1611(e) would deny SSI payments to residents of public mental institutions.

In sum, "Congress was aware of what it was doing" when it incorporated the Medicaid eligibility provisions into Section 1611(e), and "the legislative history does not demonstrate that the plain language was not intended." *Maine* v. *Thiboutot*, No. 79–838 (June 25, 1980), slip op. 6. In any event, even if appellees are correct that Congress did not intend to exclude their class from the benefits of the statute, the proper remedy would be with Congress and not the courts.

ARGUMENT

SECTION 1611(e) OF THE SOCIAL SECURITY ACT, WHICH EXCLUDES RESIDENTS OF PUBLIC MENTAL INSTITUTIONS WHOSE CARE IS NOT FUNDED UNDER MEDICAID FROM ELIGIBILITY FOR SSI PUBLIC ASSISTANCE BENEFITS, DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT

A. INTRODUCTION

The equal protection issue in this case arises from the interaction of two complex statutory schemes, but the focus of appellees' constitutional challenge is quite narrow. Section 1611(e)(1)(A) of the Social Security Act provides that inmates of public institutions are ineligible for SSI benefits. The district court upheld, and appellees do not contest, the constitutionality of this blanket exclusion from the SSI program. As the court below correctly observed (J.S. App. 8a), "Congress could well conclude that public institution inmates are receiving all of the funds from the public treasury to which they are entitled."

In Section 1611(e)(1)(B) of the Act, however, Congress sought to temper this exclusion by providing that otherwise eligible residents of public medical institutions are entitled to an SSI allowance not exceeding $25 per month if the institutions are receiving Medicaid payments on their behalf. The report of the Senate Committee explained the scope and purpose of this provision:

> People who are residents in certain public institutions, or hospitals or nursing homes which are getting Medicaid funds, would get benefits of up to $25 a month (reduced by nonexcluded income). For these people most subsistence needs are met by the institution and full benefits are not needed. Some payment to these people, though, would be needed to enable them to purchase small comfort items not supplied by the institution. No supplemental security benefits will be paid to an individual in a penal institution.

S. Rep. No. 92–1230, 92d Cong., 2d Sess. 386 (1972). See H.R. Rep. No. 92–231, 92d Cong., 1st Sess. 150 (1971).[8] Thus, Section 1611(e)(1)(B) provides a modest monthly allowance to institutionalized Medicaid recipients, for whom the federal government has already assumed substantial financial responsibility, to enable them to purchase items not covered by the Medicaid program. Appellees are not entitled to receive

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[8] In connection with a proposed amendment to the SSI statute, the House Ways and Means Committee recently described in similar fashion the nature of the provision at issue here:

> Under existing law when an individual enters a hospital or other medical institution in which a major part of the bill is paid by the medicaid program his monthly SSI benefit is reduced to $25 * * *. This amount is intended to take care of small personal expenses, with the cost of maintenance and medical care being provided through other programs.

H.R. Rep. No. 96–451 (Pt. 1), 96th Cong., 1st Sess. 153 (1979).

the monthly $25 SSI payment because, as patients between the ages of 21 and 64 in mental hospitals, they are excluded from coverage under the Medicaid program.

In holding that Section 1611(e)(1)(A)–(B) denies appellees the equal protection of the laws, the district court did not question the constitutionality of the provisions in the Medicaid statute generally excluding federal funding for the costs of inpatient treatment for individuals in public and private mental hospitals. The constitutionality of the Medicaid eligibility provisions was upheld by this Court in its summary affirmance in *Legion* v. *Richardson*, 354 F. Supp. 456 (S.D.N.Y.), aff'd *sub nom. Legion* v. *Weinberger*, 414 U.S. 1058 (1973),[9] and we do not understand appellees to challenge the result in that case (see pages 28–30, *infra*).[10]

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[9] See *Harris* v. *McRae*, *supra*, slip op. 26 n.28; *id.* at 7 n.5 (Marshall, J., dissenting); *id.* at 7 n.8 (Stevens, J., dissenting). See also *Woe* v. *Mathews*, 408 F. Supp. 419 (E.D.N.Y. 1976), aff'd, 562 F.2d 40 (2d Cir. 1977), cert. denied, 434 U.S. 1048 (1978); *Kantrowitz* v. *Weinberger*, 388 F. Supp. 1127 (D.D.C. 1974), aff'd, 530 F.2d 1034 (D.C. Cir.), cert. denied, 429 U.S. 819 (1976).

[10] Nor did the district court question the distinction drawn in the SSI statute between eligible individuals in public institutions whose treatment is funded under Medicaid and who thus receive the $25 monthly allowance, and residents of private institutions not receiving Medicaid funds on their behalf, who receive the full SSI payment. Full benefits are made available to the latter group because most of their subsistence needs are not met by the private institution. See S. Rep. No. 92–1230, *supra*, at 386; H.R. Rep. No. 92–231, *supra*, at 150. On the other hand, eligible SSI recipients in private medical facilities whose treatment is funded under the Medicaid program only receive the $25 monthly SSI payment, rather than full SSI benefits, on the theory that, like public institution residents who are covered under Medicaid, their basic living expenses (that the SSI payment was intended to cover) are being met by the expenditure of public funds. See 42 U.S.C. 1382(e)(1)(B); Staff of Senate Comm. on Finance, 95th Cong., 1st Sess., *The Supplemental Security Income Program* 66–67, 109–110 (Comm. Print 1977).

The sole question presented is whether it was constitutionally permissible for Congress to incorporate the same distinction upheld in *Legion* when it enacted the SSI program—that is, to refuse to provide any SSI benefits to public institution residents (such as appellees) whose treatment is not funded through the Medicaid program.

The standard for assessing equal protection claims of this sort is a familiar one. As this Court recently stated in *Harris* v. *McRae, supra,* slip op. 22–23 (footnote and citations omitted):

> The guarantee of equal protection under the Fifth Amendment is not a source of substantive rights or liberties, but rather a right to be free from invidious discrimination in statutory classifications and other governmental activity. It is well-settled that where a statutory classification does not itself impinge on a right or liberty protected by the Constitution, the validity of classification must be sustained unless "the classification rests on grounds wholly irrelevant to the achievement of [any legitimate governmental] objective."

Laws providing for governmental payments of monetary benefits are "entitled to a strong presumption of constitutionality." *Mathews* v. *De Castro,* 429 U.S. 181, 185 (1976). Moreover, in enacting legislation providing for payment of public assistance benefits, "a government does not deny equal protection 'merely because the classifications made by its laws are imperfect. If the classification has some reasonable basis, it does not offend the Constitution simply because the classification is not made with mathematical nicety or because in practice it results in some inequality.' " *Ibid.,* quoting from *Dandridge* v. *Williams,* 397 U.S. 471, 485 (1970). See, *e.g., Califano* v. *Boles,* 443 U.S. 282, 284–285 (1979), *Personnel Adm'r of Massachusetts* v. *Feeney,*

442 U.S. 256, 271–272 (1979); *Califano* v. *Aznavorian*, 439 U.S. 170, 174–175 (1978); *Weinberger* v *Salfi*, 422 U.S. 749, 768–770 (1975).

The district court correctly determined (J.S. App. 6a n.3) that the statutory classification contained in Section 1611(e) does not abridge any fundamental right. See, *e.g.*, *Harris* v. *McRae*, *supra*, slip op. 12–19; *Maher* v. *Roe*, 432 U.S. 464, 471–477 (1977); *Massachusetts Bd. of Retirement* v. *Murgia*, 427 U.S. 307, 313 (1976). The court concluded, however, that the statute invidiously discriminates on the basis of mental health, that mental health classifications are "quasi-suspect" and must be scrutinized under a heightened standard of review, and that the statute did not pass muster under this heightened standard. So far as we are aware, no other federal court has held that statutory classifications based on mental health are subject to a level of scrutiny higher than the "rational basis" test.[11] The question whether mental health

[11] The district court accurately noted (J.S. App. 13a) that two courts have refused to apply a heightened standard of review in examining mental health classifications. *New York State Ass'n for Retarded Children* v. *Rockefeller*, 357 F. Supp. 752, 762 (E.D.N.Y. 1973); *Doe* v. *Colautti*, 454 F. Supp. 621, 632 (E.D.Pa. 1978), aff'd, 592 F.2d 704 (3d Cir. 1979). However, the court below erroneously cited two other district court decisions (*Frederick L.* v. *Thomas*, 408 F. Supp. 832, 836 (E.D. Pa. 1976); *Fialkowski* v. *Shapp*, 405 F. Supp. 946, 958–959 (E.D. Pa. 1975)) as authority for application of so-called "middle-tier scrutiny" (J.S. App. 14a) with regard to mental health classifications. In both of the latter cases the discussion of the appropriate level of review was dictum. Both cases involved decisions on motions to dismiss, and the opinions did no more than permit the plaintiffs to attempt to prove their case. Moreover, both cases concerned deprivation of educational benefits, and the courts appeared to view the statutes at issue as possibly abridging a fundamental interest. But cf. *San Antonio School District* v. *Rodriguez*, 411 U.S. 1, 35–39 (1973).

classifications must be viewed under this stricter standard is an important one that may some day require resolution by this Court. But the Court need not address the question in this case because, as we now demonstrate, Section 1611(e) does not discriminate against the mentally ill.

B. SECTION 1611(e) IS NOT PREDICATED ON A CONSTITUTIONALLY SUSPECT CLASSIFICATION

1. The SSI Program Does Not Classify Benefit Recipients On The Basis of Mental Health

The SSI program was enacted to provide public assistance payments to indigent individuals who are aged, blind or disabled. The statutory definition of the term disability includes those who are "unable to engage in any substantial gainful activity by reason of any medically determinable physical or *mental* impairment." 42 U.S.C. 1382c(3)(A) (emphasis added).[12] Individuals such as appellees who are mentally impaired may be found disabled and, as a result of such disability, are eligible for benefits under the SSI program. Appellees specifically acknowledged in their complaint (J.A. 17, 23–24) that they are disabled because of their mental conditions and that they would be entitled to receive full SSI benefits but for the fact that they are residing in public mental health institutions. The district court's conclusion that the statute discriminates against a class of mentally ill people thus ignores the fact that appellees are entitled to receive SSI payments in the first instance solely *because* of their mental illness.

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[12] A physical or mental impairment is defined as "an impairment that results from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques." 42 U.S.C. 1382c(3)(C). An individual's description of his symptoms without more is insufficient to establish the existence of a physical or mental impairment. See 20 C.F.R. 416.902(c).

Appellees argue (Motion to Affirm 8), however, that Section 1611(e) "creates the SSI exclusion by incorporating for public medical institution patients an institutional Medicaid eligibility classification *based on mental health*" (emphasis added). There is some surface plausibility to this contention, since appellees would be entitled to SSI benefits if they were not hospitalized in a public mental institution, and they would not be institutionalized if they did not require inpatient care for their mental conditions.[13] Nevertheless, careful scrutiny of the statutory scheme compels the conclusion that the distinctions drawn in Section 1611(e) and in the Medicaid statute that it incorporates are based not on mental health but rather on the patient's age and the type of public institution in which he is receiving treatment.

So long as they otherwise meet eligibility requirements, numerous categories of mentally disabled persons receive payments under the SSI program. Appellees, for example, would be receiving full SSI benefits if they were not institutionalized or if they were residing in a private mental hospital.[14] Furthermore, if appellees were inpatients in a public general health care institution (either a hospital, skilled nursing home or intermediate care facility) that was receiving Medicaid funds to pay for the costs of treating

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[13] Of course, if appellees did not require some professional care for their mental conditions, they also presumably would not be disabled within the meaning of 42 U.S.C. 1382c(3)(A) and hence would not be entitled to SSI benefits in the first place. Much of the appeal of appellees' arguments evaporates when it is realized that the arguments rest largely on this tautology.

[14] In the latter situation, appellees would not be subject to the general public institution inmate exclusion in Section 1611(e)(1)(A). Nor would their SSI payments be limited to $25 per month under Section 1611(e)(1)(B) because their treatment would not be covered under Medicaid.

appellees' mental illness, they would be entitled to the monthly $25 SSI allowance. Similarly, if appellees remained in public mental hospitals and were either under 21 years of age or at least 65 years old, they would also be eligible for the $25 SSI payment.

Conversely, under Section 1611(e) numerous categories of otherwise eligible individuals in public institutions whose treatment is excluded from coverage under Medicaid do not receive SSI payments for reasons wholly unrelated to their mental health status. These groups include residents of public institutions in states that have chosen not to participate in the Medicaid program; residents of a public institution that is not a medical institution [15] (*e.g.*, a publicly owned personal care home or halfway house; see 42 U.S.C. 1396d(a)(17)(A)); residents under the age of 65 in public institutions for treatment of tuberculosis (see 42 U.S.C. 1396d(a)(1), (4)(A), (14), (15), (17)(B)); residents of public intermediate care facilities in states whose Medicaid plans do not provide coverage for treatment in such facilities (see 42 U.S.C. 1396a(a)(13)(B), (C)); residents of public facilities that are either unlicensed because they do not meet state standards or are licensed but not certified by the state as a provider (see 42 U.S.C. 1396a(a)(9)(A), (22)(B), (33); cf. *O'Bannon* v. *Town Court Nursing Center*, No. 78–1318 (June 23, 1980), slip op. 2; *Koe* v. *Califano*, 573 F. 2d 761 (2d Cir. 1978)); and persons who have been inpatients in public facilities for more than 21 days in states whose Medicaid plans have 21-day limits on coverage of inpatient care (see *Virginia Hospital Ass'n* v. *Kenley*, 427 F. Supp. 781 (E.D. Va. 1977)).

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[15] If such a facility has fewer than 16 residents, it is not considered a "public institution" for purposes of Section 1611(e), and its residents, if otherwise eligible, would receive full SSI benefits. See 42 U.S.C. 1382(e)(1)(C).

Thus, although appellees are excluded from SSI benefits by virtue of the incorporation of the Medicaid eligibility scheme into Section 1611(e), it is inaccurate to characterize the statutory classification as being based on mental health. There are large numbers of other institutionalized individuals not covered by Medicaid who are similarly excluded from SSI benefits without regard to their mental conditions. By the same token, there are large numbers of mentally disabled persons who are entitled to receive full SSI benefits or (because they are institutionalized but their institutionalization is covered by Medicaid) reduced SSI benefits. Section 1611(e) treats mentally ill patients between the ages of 21 and 64 in public mental institutions in the same way that it treats mentally healthy patients in other public institutions whose treatment is not funded through Medicaid. Both are ineligible for payments under the SSI program. Moreover, the costs of appellees' treatment are not paid for under the Medicaid program for entirely legitimate reasons (see pages 28–30, *infra*) that were sustained by this Court in *Legion* and that appellees do not challenge here (see Motion to Affirm 10–11).

Section 1611(e) and the Medicaid eligibility scheme that it incorporates are facially neutral as to the mental health of benefit recipients. "The equal protection component of the Fifth Amendment prohibits only purposeful discrimination * * *, and when a facially neutral federal statute is challenged on equal protection grounds, it is incumbent upon the challenger to prove that Congress 'selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse consequences on an identifiable group.'" *Harris* v. *McRae, supra,* slip op. 24 n.26, quoting from *Personnel Adm'r of Massachusetts* v. *Feeney, supra,* 442 U.S. at 279. There is absolutely no evidence to support a finding that Congress created the statutory classification because of antipathy toward the mentally ill or a purposeful desire to discriminate against them. See *New*

York Transit Authority v. *Beazer*, 440 U.S. 568, 592–593 & n.40 (1979). Compare, *e.g.*, *U.S. Dep't of Agriculture* v. *Moreno*, 413 U.S. 528 (1973).[16] Hence, the district court erred in applying a heightened standard of review based on its mistaken premise that the statute discriminates against the mentally ill.

2. Neither Age Nor Residence in a Public Mental Institution Is A Suspect Criterion For Purposes of Equal Protection Analysis

Although Section 1611(e) (when read together with certain provisions of the Medicaid eligibility scheme) does not draw distinctions based on an individual's mental health, it does create a classification predicated on two other factors: age and residence in a public mental institution. Neither factor defines a class that is suspect or "quasi-suspect" for purposes of equal protection analysis.

In *San Antonio School District* v. *Rodriguez*, 411 U.S. 1, 28 (1973), this Court observed that a suspect class is one

> saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.

To the extent that Section 1611(e) discriminates on the basis of age, the district court correctly held (J.S. App. 7a) that such a classification is valid if there is "a rational relationship between the classification and a legitimate state interest." See *Vance* v. *Bradley*, 440 U.S. 93, 97 (1979); *Massachusetts Bd. of Retirement* v. *Murgia*, *supra*, 427 U.S. at 312. Persons between the ages of 21 and 64 clearly are

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[16] Indeed, appellees' claim of invidious discrimination is inconsistent both with the statutory definition of disability as including a mental impairment (42 U.S.C. 1382c(3)(A)) and with their assertion that the statutory classification was the product of legislative inadvertence. As we show below (pages 32–35, *infra*), this latter assertion is also without foundation.

not a "discrete and insular" group (*United States* v. *Carolene Products Co.*, 304 U.S. 144, 152–153 n.4 (1938)) in need of "extraordinary protection from the majoritarian political process." *San Antonio School District* v. *Rodriguez*, *supra*, 411 U.S. at 28. See *Massachusetts Bd. of Retirement* v. *Murgia*, *supra*, 427 U.S. at 313. Once the members of appellees' class reach 65 years of age they will be entitled to SSI benefits even if they are at that time residing in public mental institutions.

Nor do residents of public mental institutions comprise a class warranting strict or "middle-tier" (J.S. App. 13a) judicial scrutiny. The distinguishing feature of classification based on race and national origin, the so-called "suspect" groups, is that members of such groups are identifiable by certain immutable characteristics, determined solely by accident of birth, that bear "no relation to the individual's ability to participate in and contribute to society." *Mathews* v. *Lucas*, 427 U.S. 495, 505 (1976). See also *Frontiero* v. *Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion). Appellees' presence in public mental hospitals, rather than in private mental hospitals or general health care facilities, is certainly not a permanent condition determined by accident of birth.[17] Indeed, members of appel-

[17] Nor is appellees' residence in public mental institutions necessarily "a factor over which they have no control" (J. S. App. 13a). Several of the appellees were voluntarily admitted to such institutions (J. A. 17), and the remaining appellees have not challenged the procedures that led to their involuntary institutionalization. Cf. *Vitek* v. *Jones*, No. 78–1155 (Mar. 25, 1980); *Parham* v. *J. R.*, 442 U.S. 584 (1979); *Addington* v. *Texas*, 441 U.S. 418 (1979). Insofar as appellees' presence in a public mental institution is the result of their indigency, this Court has repeatedly rejected the notion that "financial need alone identifies a suspect class for purposes of equal protection analysis." *Maher* v. *Roe*, *supra*, 432 U.S. at 471. See *Harris* v. *McRae*, *supra*, slip op. 23–24; *San Antonio School District* v. *Rodriguez*, *supra*, 411 U.S. at 29.

lees' class have been hospitalized in order to obtain treatment for their mental conditions; once they are deemed sufficiently rehabilitated, they will be discharged and may qualify for SSI benefits assuming that they remain otherwise eligible (*e.g.*, assuming that they are still disabled by reason of mental impairment).[18]

Appellees assert (Motion to Affirm 22) that "[v]irtually all states disenfranchise the 'insane'" and that therefore psychiatric inpatients have limited political influence. But as appellees themselves concede (Motion to Affirm 23), the disenfranchisement of most mental institution residents is based not on "stereotyped characteristics not truly indicative of their abilities" (*Massachusetts Bd. of Retirement* v. *Murgia*, *supra*, 427 U.S. at 313), but on factors directly related to their abilities "to participate in and contribute to society." *Mathews* v. *Lucas*, *supra*, 427 U.S. at 505. In addition, while institutionalized mental patients "may indeed make up a 'minority,' they are not so much the victims of social prejudice as of [mental] infirmity and social neglect. Moreover, concerned friends and relatives or organized interest groups may, and often do, step forward to protect the interests of" such patients. *O'Bannon* v. *Town Court Nursing Center*, *supra*, slip op. 11 n. 8 (Blackmun, J., concurring). In fact, the legislative history of the amendments to the Social Security Act that established the SSI program shows that several witnesses testified before the Senate Committee on Finance in support of extending Medicaid coverage to patients between 21 and 64 years of age in mental hospitals and in support of extending SSI benefits to all residents of public mental institutions. See *Social Security Amendments*

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[18] We note in this regard that appellee Welch was admitted to a public mental hospital in October 1973 and was released three months later, in January 1974 (J.A. 15).

of 1971: Hearings on H.R. 1 Before the Senate Comm. on Finance, 92d Cong., 1st & 2d Sess. 924–941, 2180, 2408–2415, 2479–2486, 3255–3258, 3318–3321 (1971–1972).[19]

Furthermore, as we have already observed (pages 19–23, *supra*), in establishing the SSI program Congress expressly recognized that mentally disabled individuals were in need of supplemental public assistance, and the exclusion of appellees from SSI benefits is based on factors other than their mental conditions. In sum, the statutory classification is not predicated on criteria that are, in a constitutional sense, "suspect." In order to satisfy the equal protection guarantee embodied in the Due Process Clause, the statute need only be shown to have some rational basis. See, *e.g.*, *Califano* v. *Aznavorian*, *supra*, 439 U.S. at 174–175; *Mathews* v. *De Castro*, *supra*, 429 U.S. at 185; *Weinberger* v. *Salfi*, *supra*, 422 U.S. at 770. As we show below (pages 26–32, *infra*), the classification in this case unquestionably meets the rational basis test.

C. THE CLASSIFICATION DRAWN IN SECTION 1611(e) IS RATIONALLY RELATED TO LEGITIMATE GOVERNMENTAL PURPOSES

1. Congress could rationally limit SSI payments to inmates of public institutions who are receiving Medicaid benefits

In enacting Section 1611(e), Congress intended generally to exclude SSI payments to otherwise eligible recipients who are inmates in a public institution and whose care thus is

[19] Indeed, the very benefits that appellees seek in this litigation have been extended by Congress to public mental hospital residents under 21 and 65 years of age or older. The failure of Congress to provide benefits to members of appellees' class thus cannot be attributed to "a history of purposeful unequal treatment" or "political powerlessness." *San Antonio School District* v. *Rodriguez*, *supra*, 411 U.S. at 28.

being paid for out of local or state government funds. The $25 monthly SSI payment to individuals in public institutions whose treatment is covered under the Medicaid program was meant to provide those individuals who receive federal financial assistance for the costs of their treatment with a small cash allowance for personal needs that are not within Medicaid. Appellees do not directly challenge the reasonableness of these congressional policy choices. Nor do they contend that Congress improperly excluded from coverage under Medicaid the treatment of persons between 21 and 64 years of age in mental institutions. Rather, appellees' argument boils down to the claim that it is somehow unfair to deny them SSI benefits just because their institutionalized treatment is not funded under Medicaid. But if it is a violation of equal protection principles to deny SSI benefits to appellees because they are not eligible for Medicaid, then presumably it is equally unconstitutional to deny SSI benefits to *any* otherwise eligible resident of a public institution who—for whatever reason—is not entitled to Medicaid benefits. Contrary to appellees' argument, however, Congress had a rational basis for its determination to provide SSI benefits (reduced to $25 per month) only to those public institution residents who are eligible for Medicaid.

Congress' decision to deny SSI benefits to certain public institution residents whose treatment is not funded through the Medicaid program, including individuals between 21 and 64 years of age in public mental hospitals, is rationally related to the legitimate legislative desire to avoid spending federal resources on behalf of individuals whose care and treatment are being fully provided for by state and local government units. Put another way, the statute may be said to implement a congressional policy choice to provide supplemental financial assistance for only those residents of public institu-

tions who already receive significant federal support in the form of Medicaid coverage.[20]

As we have noted above, the exclusion from Medicaid benefits of mental institution residents aged 21 to 64 is not directly challenged in this case. Nevertheless, because appellees do challenge their exclusion from SSI benefits, which in turn is based directly on their exclusion from the Medicaid program, we first examine the validity of the Medicaid eligibility scheme.

In 1950, Congress adopted a system of federal grants to the states for the operation of state programs to aid the permanently and totally disabled. The statute establishing the aid program specifically excluded payments on behalf of "any individual * * * who is a patient in an institution for * * * mental diseases." Social Security Amendments of 1950, ch. 809, 64 Stat. 558. When Congress adopted the Medicaid Act in 1965, Social Security Amendments of 1965, Pub. L. No. 89–97, 79 Stat. 286 *et seq.*, it retained the general exclusion of patients in institutions for treatment of mental illness. Section 1905(a)(1), (4), (15)(B), 79 Stat. 351–352. This exclusion was based on Congress' understanding that the long term care of patients in mental institutions "had traditionally been ac-

[20] In addition, by providing SSI benefits only to residents of Medicaid-funded public institutions, Section 1611(e) encourages SSI recipients to obtain treatment at public facilities that meet certain minimum standards. Cf. *O'Bannon* v. *Town Court Nursing Center*, *supra*, slip op. 12–14. Because some residents of public mental institutions may not have a choice of facilities at which they are to receive treatment (see note 17, *supra*), we do not press this additional legislative goal as a basis for upholding the statute in the context of this case. We note, however, that the mere fact that the statute serves additional legitimate purposes does not detract from the legitimacy of the reasons we urge here in support of the statutory classification. See *McGinnis* v. *Royster*, 410 U.S. 263, 274–277 (1973); *Mathews* v. *Lucas*, *supra*, 427 U.S. at 509 n.15.

cepted as a responsibility of the States." S. Rep. No. 404, 89th Cong., 1st Sess. 144 (1965); see *id.* at 146; H.R. Rep. No. 213, 89th Cong., 1st Sess. 126, 128 (1965). At the same time, however, Congress did provide Medicaid coverage to the needy aged in mental institutions (Section 1905(a)(14), 79 Stat. 352), in recognition of the severe health cost problems of persons over 65 years of age. See S. Rep. No. 404, *supra*, at 277 (supplemental views).[21]

In 1972, Congress further broadened the class of mental patients eligible for Medicaid by providing for the eligibility of children. Social Security Amendments of 1972, Pub. L. No. 92–603, Section 299B(a), (b), 86 Stat. 1460–1461. The 1972 amendments extended Medicaid coverage to persons under age 21 who are inpatients in psychiatric hospitals, provided that the treatment is certified as being likely to improve the patient's condition. In providing for this expansion of coverage, Congress expressed its belief that "the nation cannot make a more compassionate or better investment in medicaid than this effort to restore mentally ill children to a point where they may very well be capable of rejoining and contributing to society as active and constructive citizens." S. Rep. No. 92–1230, *supra*, at 281. See 118 Cong. Rec. 36915 (1972) (remarks of Rep. Mills).

As the district court concluded in *Legion* v. *Richardson*, *supra*, the general exclusion from Medicaid coverage of persons in mental institutions reflects Congress' reasonable belief that the care of the mentally ill in mental hospitals is

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[21] Medicaid coverage was also provided for the treatment of the mentally ill in general care facilities, including nursing homes and medical hospitals. Section 1905(a) (1), (4), 79 Stat. 351. In providing this assistance, Congress sought to encourage alternative forms of treatment for the mentally ill outside the traditional setting of the mental institution. S. Rep. No. 404, *supra*, at 144–147.

properly the responsibility of the states. 352 F. Supp. at 459. Insofar as the Medicaid program classifies on the basis of age, by extending coverage to children and the aged in mental institutions while excluding those between 21 and 64 years of age, that age-based classification was correctly upheld in *Kantrowitz* v. *Weinberger,* 388 F. Supp. 1127 (D.D.C. 1974), aff'd, 530 F. 2d 1034 (D.C. Cir.), cert. denied, 429 U.S. 819 (1976), where the district court held that in view of the enormous expense involved in supplementing traditional state aid to the mentally ill, Congress could rationally decide to extend Medicaid coverage one step at a time to those perceived as most in need of assistance. 388 F. Supp. at 1131. See *Califano* v. *Jobst,* 434 U.S. 47, 57 (1977); *Jefferson* v. *Hackney,* 406 U.S. 535, 546 (1972).

By incorporating the Medicaid eligibility scheme into Section 1611(e), Congress simply drew the line in providing SSI payments to residents of public institutions at those for whom the federal government had already assumed partial financial responsibility, while leaving to the states and local governments the duty of providing for the needs of all other public institution residents. "Congress could rationally conclude that [these] need[s] should continue to be met primarily by the States * * *." *Richardson* v. *Belcher,* 404 U.S. 78, 84 (1971).

Appellees contend (Motion to Affirm 12–13), however, that, unlike Medicaid, SSI is a wholly federal program through which "Congress essentially preempted the field of income maintenance for the aged, blind and disabled, including those residing in public and private medical institutions." But while it is true that Congress in enacting Title XVI intended to create "a single Federal program * * * with uniform Federal benefits and uniform eligibility requirements" (118 Cong. Rec. 36916 (1972) (remarks of Rep. Mills)), the fact remains that the SSI program is not unlimited in scope and was not meant to

displace the states completely in the provision of public assistance to the aged, blind and disabled. See 118 Cong. Rec. 32898 (1972) (remarks of Sen. Long) ("This is a program * * * which I think will, *in large measure,* replace present State programs * * *"; emphasis added). SSI is dotted with exceptions, the most significant of which is the exclusion of residents (including prison inmates) in state-run institutions.[22] As the court remarked in *Baur* v. *Mathews,* 578 F.2d 228, 233 (9th Cir. 1978):

> Undoubtedly the new federal program was intended to make uniform the eligibility requirements and the benefits under the federal supplemental social insurance program. The federal government has assumed a major portion of the responsibility of providing for those whose earnings fall below specified levels. Yet Congress did not determine to displace the existing state programs for assisting the needy aged, blind or disabled. Considerations of economic efficiency as well as respect for the state's traditionally local responsibility to care for its citizens seemed to motivate the exception from benefits of persons already receiving treatment at state or local institutions.

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[22] See also, *e.g.*, 42 U.S.C. 1382(e)(3)(A)–(B) (excluding drug addicts and alcoholics from SSI benefits unless they are receiving appropriate treatment at an approved institution and are complying with the terms of such treatment); 42 U.S.C. 1382(f) (excluding individuals who have spent one full month or more outside the United States). The constitutionality of the latter provision was upheld by this Court in *Califano* v. *Aznavorian, supra.* We note that the public institution exclusion in Section 1611(e) and the mental institution exclusion incorporated into Section 1611(e) from the Medicaid statute were essentially carried over, with some modifications that enlarged the class of eligible recipients, from the prior statutory scheme that had provided for cooperative federal-state assistance programs for the aged, blind and disabled. See 42 U.S.C. (1964 ed.) 306 (a), (b); 42 U.S.C. (1970 ed.) 1206; 42 U.S.C. (1970 ed.) 1355; 42 U.S.C. (1964 ed.) 1385 (a)(I), (b)(12)(A).

Appellees also contend (Motion to Affirm 13–17) that members of their class have the same, if not a greater, need for the monthly $25 SSI allowance than do other institutionalized indigents who receive the allowance because their treatment is covered by Medicaid. The same could be said about all other persons who would qualify for SSI benefits but for the fact that they are inmates in non-Medicaid institutions. But the statutory classification does not exclude non-Medicaid recipients because they were thought to be less needy; indeed, if those individuals were in a different type of institution where the costs of their treatment were paid out of Medicaid funds they would be eligible for SSI benefits. Congress certainly may consider factors other than need in deciding how to distribute public assistance benefits. See *Harris* v. *McRae, supra.*

Even if the line drawn by Congress in Section 1611(e) is not perfect, "it is nevertheless the rule that in a case like this 'perfection is by no means required.' " *Vance* v. *Bradley, supra,* 440 U.S. at 108, quoting from *Phillips Chemical Co.* v. *Dumas School District,* 361 U.S. 376, 385 (1960). See *New York Transit Authority* v. *Beazer, supra,* 440 U.S. at 592 n.39; *Califano* v. *Aznavorian, supra,* 439 U.S. at 175; *Dandridge* v. *Williams, supra,* 397 U.S. at 485. Congress could reasonably determine to achieve the goal of providing a personal needs allowance under SSI for all indigent residents of public institutions by first providing such an allowance to those public institution residents whose institutional expenses were already being funded by the federal government. General rules of this sort are constitutional "even though such rules inevitably produce seemingly arbitrary consequences in some individual cases." *Califano* v. *Jobst, supra,* 434 U.S. at 53.

2. The statutory classification is not the product of congressional inadvertence

A major concern underlying the district court's decision was the belief that the statute may have been "an accidental byproduct of the legislative scheme rather than an intended means of achieving a calculated legislative objective" (J.S. App. 17a). Appellees similarly assert that Congress failed "not only to give a reason for excluding appellees from the SSI program, but also to give any indication that it wanted to exclude, or understood that it was excluding, appellees" (Motion to Affirm 7, 11, 19–20).

The fact that Congress did not articulate any particular rationale for the classification is, of course, of no significance in assessing the constitutionality of the statute, since "[a] statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan* v. *Maryland*, 366 U.S. 420, 426 (1961). See *Vance* v. *Bradley*, *supra*, 440 U.S. at 111; *Dandridge* v. *Williams*, *supra*, 397 U.S. at 485. Nonetheless, the legislative record convincingly establishes that the statutory classification is not an "historical accident" (*Illinois State Bd. of Elections* v. *Socialist Workers Party*, 440 U.S. 173, 187 (1979)), but rather is "the considered product of a legislature." *Id.* at 191 (Rehnquist, J., concurring).

The reports of both the Senate and House committees specifically state that the $25 SSI personal needs allowance would be provided to "[p]eople who are residents of *certain* public institutions, or hospitals or nursing homes *which are getting Medicaid funds* * * *." S. Rep. No. 92–1230, *supra*, at 386; H.R. Rep. No. 92–231, *supra*, at 150; see also 117 Cong.

Rec. 21103 (1971) (remarks of Rep. Mills). By negative implication this language plainly betokens an intent that residents of some public institutions that are not receiving Medicaid funds would not be eligible for the SSI allowance.

In addition, it is significant that the SSI program was created by Congress as part of a comprehensive effort to amend the Social Security Act. See 118 Cong. Rec. 32470 (1972) (remarks of Sen. Long). In the same bill that provided for the SSI program in Title XVI of the Act, Congress enacted numerous amendments to Title XIX (the Medicaid program), including the provision (42 U.S.C. 1396d(a)(16), (h)) that extended Medicaid coverage to inpatient psychiatric hospital services for persons under age 21. Section 299 (B)(a), (b), 86 Stat. 1460–1461. See H.R. Conf. Rep. No. 92–1605, 92d Cong., 2d Sess. 65 (1972); S. Rep. No. 92–1230, *supra,* at 280–281; 118 Cong. Rec. 36915 (1972) (remarks of Rep. Mills); 118 Cong. Rec. 32472–32473 (1972) (remarks of Sen. Long). At the same time, a Senate proposal to authorize demonstration projects for the purpose of evaluating the feasibility of extending Medicaid coverage to persons between the ages of 21 and 64 in mental hospitals (see S. Rep. No. 92–1230, *supra,* at 281) was rejected in conference. See H.R. Conf. Rep. No. 92–1605, *supra,* at 65; 118 Cong. Rec. 36519 (1972) (remarks of Rep. Mills).

Thus, there can be little doubt that, when it established the SSI program providing for the exclusion of public institution residents whose treatment was not covered by Medicaid, Congress was well aware that individuals aged 21 to 64 in public mental hospitals were not eligible for Medicaid and therefore would not be entitled to receive reduced SSI benefits. Indeed, in the course of the lengthy hearings before the Senate Committee on Finance, several witnesses specifically

pointed out that one effect of the proposed Section 1611(e) would be to deny SSI payments to residents of public mental institutions. See *Senate Hearings, supra,* at 2180, 3257, 3319.

Appellees (Motion to Affirm 7–8, 20) and the district court (J.S. App. 16a) both emphasize that in the committee reports explaining the classification in Section 1611(e) the only individuals whom Congress specifically expressed an intent to exclude from SSI benefits were inmates in penal institutions. See S. Rep. No. 92–1230, *supra,* at 386; H.R. Rep. No. 213, *supra,* at 150. But if Congress had simply meant to preclude prison inmates from participating in the SSI program, it could have achieved that purpose in a much more direct manner, without incorporating the Medicaid eligibility scheme into Section 1611(e) at all. See *Barrett* v. *United States,* 423 U.S. 212, 217 (1976). In short, "Congress was aware of what it was doing, and the legislative history does not demonstrate that the plain language [of Section 1611(e)] was not intended." *Maine* v. *Thiboutot,* No. 79–838 (June 25, 1980), slip op. 6.

Section 1611(e) should be upheld as a rational exercise of congressional power in the social welfare area. Appellees' attempt to draw the Court into second-guessing Congress' judgment must fail because the question here is not whether the statutory classification embodies wise policy. As the Court recently remarked, "we cannot, in the name of the Constitution, overturn duly enacted statutes simply 'because they may be unwise, improvident, or out of harmony with a particular school of thought.'" *Harris* v. *McRae, supra,* slip op. 26, quoting *Williamson* v. *Lee Optical Co.,* 348 U.S. 483, 488 (1955). "The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process."

Vance v. *Bradley, supra,* 440 U.S. at 97. See *Personnel Adm'r of Massachusetts* v. *Feeney, supra,* 442 U.S. at 272.[23]

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

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AUGUST 1980

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[23] See *Maine* v. *Thiboutot, supra,* slip op. 6–7 (footnote omitted) (appellees' "arguments amount to the claim that had Congress been more careful, and had it fully thought out the relationship among the various sections, it might have acted differently. That argument, however, can best be addressed to Congress * * *"). See also *Delaware Tribal Business Comm.* v. *Weeks,* 430 U.S. 73, 90 (1977).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

PATRICIA R. HARRIS, SECRETARY OF HEALTH AND HUMAN SERVICES,

Appellant,

v.

CHARLES EDWARD WILSON, ET AL.,

Appellees.

On Appeal From The United States District Court For The Northern District Of Illinois

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QUESTION PRESENTED

Whether section 1611(e)(1)(A)-(B) of the Social Security Act violates the due process clause of the Fifth Amendment by excluding from eligibility for Supplemental Security Income public assistance benefits otherwise eligible individuals between the ages of 21 and 65 who are residents of public mental institutions.*

* SUP. CT. R. 15.1.(a) provides that "[o]nly the questions set forth in the jurisdictional statement or fairly included therein will be considered by the Court." The question set forth here is the same as presented in the Secretary's Jurisdictional Statement. The Secretary's Brief, however, now sets forth quite a different question: whether section 1611(e)(1)(A)-(B) violates the due process clause by excluding from Supplemental Security Income benefits otherwise eligible residents of *all* public institutions not funded by Medicaid. This is a much more expansive question than that in the Jurisdictional Statement, is not posed by the statutory scheme, and is not a "subsidiary question fairly included" within the question in the Jurisdictional Statement. SUP. CT. R. 15.1.(a).

PARTIES TO THE PROCEEDING IN THE DISTRICT COURT

The named plaintiffs who obtained the judgment from which the Secretary appeals are Maudie Simmons and John Turney. Judgment, Jurisdictional Statement at 22a, ¶4. They are the appellees here.*

The appellant, Patricia R. Harris, Secretary of Health and Human Services, was the defendant against whom judgment was entered. She was substituted for prior Secretaries of the Department of Health, Education and Welfare, pursuant to FED.R.CIV.P. 25(d).

* When this case was first filed, there were other named plaintiffs, including Charles Wilson. These other named plaintiffs, however, did not satisfy certain jurisdictional requirements for actions under the Social Security Act and were dismissed as party plaintiffs under the judgment of the Court of Appeals. *Wilson v. Edelman*, 542 F.2d 1260 (7th Cir. 1976). On remand from that judgment the parties and the district court nonetheless continued to use Mr. Wilson's name in the caption. In her Jurisdictional Statement the Secretary continued to use Mr. Wilson's name in the caption, and appellees have done so as well.

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No. 79-1380

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

PATRICIA R. HARRIS, SECRETARY OF HEALTH AND HUMAN SERVICES,

Appellant,

v.

CHARLES EDWARD WILSON, ET AL.,

Appellees.

On Appeal From The United States District Court For The Northern District Of Illinois

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BRIEF FOR THE APPELLEES

STATEMENT

The Secretary's Statement adequately reviews the prior proceedings and the statutory scheme in which the question presented arises. Appellees disagree, however, with the sentence at 6-7 of the Secretary's Brief characterizing the nature and scope of the statutory "exception" and "exclusion." We address this statement in the first section of our argument.

SUMMARY OF ARGUMENT

The district court correctly held that the classification created by section 1611(e)(1) of the Social Security Act (42 U.S.C. § 1382(e)(1) (1976 & Supp. II 1978) [hereinafter cited as § 1611(e)(1)] invidiously discriminates against appellees and violates the equal protection component of the due process clause of the Fifth Amendment.

I.

Under the Supplemental Security Income (SSI) program the federal government has assumed full responsibility for meeting the cash assistance needs of indigent aged, blind and disabled persons. The regular grant for an eligible individual is $238 monthly. When an eligible individual resides in a medical institution, he normally receives, pursuant to section 1611(e)(1), a reduced SSI grant of $25 monthly for those subsistence items and personal needs that the medical institution does not provide, such as clothing, reading materials, toiletries and stationery.

Section 1611(e)(1), however, denies such benefits to appellees—persons aged 22 through 64 residing in public mental hospitals. The exclusion occurs because the SSI eligibility of an indigent aged, blind or disabled person in a public medical institution is dependent on whether or not the individual is eligible for benefits under the Medicaid program.

Under the Medicaid program the federal government reimburses the states for a portion of the costs of medical care for low-income persons. As is appropriate

in a program providing benefits on the basis of medical illness or disability, the Medicaid program covers care for persons in medical institutions generally, but does not extend coverage to persons in non-medical institutions. Persons aged 22-64 in a public or private mental hospital, however, are excluded from the Medicaid coverage otherwise given to medical institution residents.

Since, for persons residing in public medical institutions, section 1611(e)(1) incorporates into SSI the Medicaid eligibility scheme, persons aged 22-64 in public mental hospitals are the only such residents who are not eligible to receive the $25 federal grant. Under section 1611(e)(1) persons in private medical institutions are not excluded to any extent, however. Those receiving Medicaid get $25 monthly. Those not receiving Medicaid (i.e., private mental hospital patients aged 22-64) get full SSI benefits. Thus appellees, patients aged 22 to 64 in public mental hospitals, are singled out for exclusion from SSI.

Section 1611(e)(1) discriminates against appellees on the basis of their mental illness. This is so even though some mentally ill persons receive SSI, and even though appellees would be eligible for SSI because of mental disability were it not for their residence in a "mental" hospital. Neither fact alters the nature of the discrimination. *See Nyquist v. Mauclet*, 432 U.S. 1, 7-9 (1977); *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 169, 172 (1972). But regardless of whether the exclusion here is viewed as discriminating against the mentally ill or as a capricious mixture using mental illness, type of institution and age as the exclusionary factors, it violates appellees' rights under the equal protection component of the due process clause of the Fifth Amendment.

II.

The exclusion of appellees from the $25 monthly personal needs grant for patients in medical institutions has no rational relationship to any legitimate governmental purpose.

A. Both parties agree that Congress did not indicate, either in the statute or its legislative history, what interests the classification here might serve. The Secretary as well fails to present any rationale for the classification. The Secretary's allusions to certain general equal protection principles, without reference to how they might justify the discrimination at issue, do not save the classification. The Secretary simply fails to explain why there is a rational line in the SSI program with indigent disabled public hospital mental patients aged 22-64 on one side, and all other indigent aged, blind or disabled residents of public or private general hospitals, mental hospitals, nursing homes, intermediate care facilities and other medical institutions on the other.

The Secretary agrees that the discrimination against appellees is not and can not be based on any judgment that their need for the monthly $25 grant is less than the need of other similarly situated residents of medical institutions. The appellees' needs, in fact, may be greater than those of residents of other medical institutions, since the grant and the opportunity it affords to purchase and own certain personal possessions combat the institutional desocialization syndrome that prolongs mental hospitalization.

B. Congress articulated specific reasons for its refusal to provide federal Medicaid matching funds to the states to subsidize the provision of medical care in mental hospitals. The reasons that justify the exclu-

sion of public and private mental hospital patients from the Medicaid program have no necessary or actual application to the denial of benefits under the SSI program to public mental hospital patients. The programs have different purposes, use different methods to distribute benefits, and, in numerous respects, have different eligibility requirements.

The Medicaid exclusion of mental hospital residents was based on a specific congressional determination that the cost of matching state expenses for medical care in mental hospitals would be very large. There was, and there could be, no comparable fiscal interest in the SSI exclusion at issue here. The cost of extending benefits to appellees is insubstantial when compared to the costs of the SSI program as a whole. Furthermore, the $25 SSI benefit to a person in a medical institution for a month is less than the federal share for Medicaid hospital costs for one patient day.

Congress determined in 1950 and 1965 that medical care in state mental hospitals was a state responsibility. In enacting the SSI program in 1972, Congress made no comparable determination that income maintenance for the aged, blind and disabled in public hospitals was also a state responsibility. Section 1611(e)(1) in fact is based on a contrary determination that such income maintenance should be a wholly federal responsibility and that this federal responsibility extends to residents of both public and private medical institutions.

The Secretary posits a line for SSI purposes between persons on whose behalf medical institutions receive partial federal Medicaid reimbursement and persons on whose behalf there is no federal Medicaid participation. The suggested line does not exist, since Medicaid reimbursement extends to mental institution care for ap-

pellees during the month in which they enter the mental hospital.

C. In measuring whether a statutory discrimination is the product of a purposeful and rational congressional scheme, the Court has looked not only for some articulation of governmental purpose, but also for an indication in the legislative history that legislators had some "recognition" or "specific knowledge" of the effect of the legislation. *Schlesinger v. Ballard*, 419 U.S. 498, 508 n.12 (1975). *See also Johnson v. Robison*, 415 U.S. 361, 381 (1974).

In this case there was no such recognition. On the contrary, Congress appears to have enacted section 1611(e)(1), which was part of a bill containing hundreds of amendments to the Social Security Act, heedless of its consequences for appellees. The legislative history not only provides no reason for the exclusion, but also essentially is silent as to its existence. The Secretary's contrary reading of the legislative history is unjustified.

The denial of SSI benefits to appellees can not be understood as part of the product of any rational congressional scheme. Rather, section 1611(e)(1) can best be understood as a reflection of congressional inattention to appellees and their needs. Such inattention results from the political powerlessness of the mentally ill and the societal antipathy that has been directed towards them, and offers the most reasonable explanation of how the invidious and irrational discrimination against appellees came about.

III.

If the Court determines that the exclusion of appellees bears a rational relationship to some legitimate govern-

mental purpose, it then becomes necessary in this case to test the exclusion under more stringent standards. Section 1611(e)(1) creates a classification that discriminates against the mentally ill and must be subjected to a heightened standard of judicial review. The classification cannot meet this test.

The mentally ill meet the criteria this Court has identified as requiring heightened judicial scrutiny of classifications affecting certain minorities. *See San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 28 (1973), and *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938). The mentally ill have been saddled with disabilities, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness. They constitute a discrete and insular minority which has been and is subjected to social prejudice and stigma. *See Vitek v. Jones*, 100 S.Ct. 1254 (1980). Mental illness also is usually a condition over which the individual has no control.

The Secretary asserts that any heightened scrutiny of the statutory exclusion here is inappropriate because mental illness relates to a person's ability to participate in or contribute to society. That assertion is itself in part a reflection of the inappropriate stereotyping of the mentally ill. Any such relationship is far more attenuated than the Secretary suggests. In any event, the groups to which this Court has given special protection have not always met all of the variously articulated criteria for triggering special scrutiny. The mentally ill are sufficiently like such groups to which special judicial protection has been extended that application of a heightened scrutiny standard to the exclusion here is appropriate.

ARGUMENT

I.

THE HISTORY AND NATURE OF THE EXCLUSION OF APPELLEES FROM SUPPLEMENTAL SECURITY INCOME ELIGIBILITY.

A. Introduction

Supplemental Security Income ("SSI") is a comprehensive federal income maintenance program for indigent aged persons and indigent blind and disabled persons under age 65. Title XVI of the Social Security Act, 42 U.S.C. §§ 1381-1385 (1976 & Supp. II 1978). The Department of Health and Human Services makes payments directly to eligible persons. The standard payment is $238 monthly. When an eligible person is in a public or private medical institution for a full month, the payment level is reduced to $25 monthly. 42 U.S.C. § 1382(e)(1) (1976 & Supp. II 1978) [hereinafter cited as section 1611(e)(1) of the Social Security Act]. Appellees, aged 22-64 and patients in public mental hospitals, are excluded from any benefits, however.

The Secretary states that this exclusion results from "the interaction of two complex statutory schemes"—Title XIX of the Social Security Act, 42 U.S.C. §§ 1396-1396k (1976 & Supp. II 1978) ("Medicaid"), and the Supplemental Security Income statute. Secretary's Brief at 14. "[A]ppellees are excluded from SSI by virtue of the incorporation of the Medicaid eligibility scheme into section 1611(e) [the SSI eligibility provision]. . . ." *Id.* at 22.

While the Secretary's summary description of the issue is sound, her fuller characterization of the interaction between Medicaid and SSI is not. Inaccurate in par-

ticular is the Secretary's statement that the SSI statute: (a) contains a "blanket exclusion" of residents of public institutions, tempered by a "limited exception" of eligibility for some medical institution patients (Brief at 6-7); and (b) does not discriminate against mental patients.

The language of the statutes and their history, reviewed below, demonstrate instead that Congress has: (a) incorporated into the SSI program the differentiation made by the Medicaid program between *medical* institution patients, who are included, and residents of public *non-medical* institutions (such as prisons), who are excluded; but (b) singled out mentally ill persons, from the universe of persons in medical institutions, for disparate exclusionary treatment.[1]

B. The History Of The Medical Assistance Provisions Incorporated Into Section 1611(e)(1)

The legislative distinctions between medical and non-medical institution residents, and between mentally ill persons and other medical institution residents, originated in the 1950 amendments to the Social Security Act. Prior to 1950 Congress had not provided for coverage of medical care for the categories of needy persons eligible for the Social Security Act's public

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[1] The statutory exclusion from SSI benefits also applies to needy persons under age 65 residing in public tuberculosis hospitals. *See* 42 U.S.C. §§ 1382(e)(1), 1396d(a)(17)(B) (1976 & Supp. II 1978). This exclusion, which is not at issue, affects a very small number of persons and will not be further discussed. In 1976 there were at any one time only 2,000 residents of tuberculosis hospitals. U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1978, at 108 (1978). The number of such residents—many of whom would be unaffected by the exclusion in any event (*e.g.*, because not needy, or over age 64, or in private tuberculosis hospitals)—had been dropping rapidly before 1976, *id.* at 109, and is likely to be even lower today.

assistance programs. The categories of persons included in the programs before 1950 were the aged, the blind, and dependent children. In 1950 Congress added disabled adults to the categories of persons eligible for assistance. Social Security Act Amendments of 1950, Pub. L. No. 81-734, ch. 809, § 351, 64 Stat. 557 (1950) (codified at 42 U.S.C. §§ 1351-1355 (1976 & Supp. II 1978)). In addition, Congress created a medical assistance program for all the categories of needy persons.

Under the medical assistance program Congress provided federal matching funds to the states to make vendor payments to public and private hospitals, nursing homes and other medical providers for "medical care . . . or any type of remedial care recognized under State law," Pub. L. No. 81-734, ch. 809, § 351, 64 Stat. 557. "Medical care" consisted of "medical services provided by any person authorized by State law to render such services." H.R. REP. NO. 1300, 81st Cong., 2d Sess. 42 (1949) [hereinafter cited as H.R. REP. NO. 1300].

The 1950 amendments contained two significant exceptions to the general coverage the medical care program offered. First, while care in medical institutions was generally included, care for residents of public non-medical institutions (*e.g.*, prisons and other correctional facilities) was excluded. "Medical care and remedial care" were defined to exclude "care in behalf of any individual who is an inmate of a public institution (except as a patient in a medical institution)." Pub. L. No. 81-734, ch. 809, §§ 303(a), 343(a), 351, 64 Stat. 549, 554, 557. Second, persons receiving treatment for mental illness were excluded from the otherwise potentially comprehensive coverage of medical institutions. Congress excluded not only a "patient in an institution for

. . . mental diseases" (Secretary's Brief at 28), but also any aged, blind or disabled person "who has been *diagnosed* as having tuberculosis or psychosis and *is a patient in a medical institution as a result* thereof." Pub. L. No. 81-734, ch. 809, §§ 303(a), 343(a), 351, 64 Stat. 549, 554, 557 (aged), (blind), (disabled) (emphasis added).[2]

The two central distinctions made in 1950 have not been eliminated by subsequent amendments to the medical assistance provisions of the Social Security Act, including the 1965 enactment of Medicaid. Social Security Amendments of 1965, Pub. L. No. 89-97, § 121, 79 Stat. 286 (codified at 42 U.S.C. §§ 1396-1396k (1976 & Supp. II 1978)). The Medicaid program specifically authorizes coverage of certain medical institutional care (*e.g.*, hospitals and nursing homes, *see* 42 U.S.C. §§ 1396d(a)(1), (4) (1976 & Supp. II 1978)). A residual clause authorizes coverage of "any other medical care, and any other type of remedial care recognized under State law. . . ." 42 U.S.C. § 1396d(a)(17) (1976 & Supp.

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[2] Senator Long later described the statute as providing that when a person was in a medical institution for any reason, "the minute it appeared that that person is mentally ill Federal aid is to be cut off." *Public Assistance Act of 1962: Hearings on H.R. 10606 Before the Senate Comm. on Finance*, 87th Cong., 2d Sess. 357 (1962). In this sense most mentally ill persons were for all practical purposes excluded from medical assistance, since there is a high correlation between the status of being treated in a medical institution for disabling mental illness and the status of being deemed mentally ill: a person usually is not labeled as mentally ill until he or she enters a medical institution for treatment of the condition. (The label continues to apply, but is tempered, after the person leaves the institution.) Johannsen, *Attitudes Toward Mental Patients: A Review of Empirical Research*, 53 MENTAL HYGIENE 218 (1969); Rabkin, *Public Attitudes Toward Mental Illness: A Review of the Literature*, SCHIZOPHRENIA BULLETIN 9, 16, 23 (1974) [hereinafter cited as *Public Attitudes*].

II 1978). That clause, however, then provides, as did the 1950 amendments, that care in medical institutions is covered but care in non-medical public institutions is not: medical care does not include "care or services for any individual who is an inmate of a public institution (except as a patient in a medical institution)". 42 U.S.C. § 1396d(a)(17)(A) (1976 & Supp. II 1978).

The second distinction, the different eligibility status of mentally ill patients in medical institutions, also has been preserved, although the exclusion has been narrowed. Since Medicaid was enacted in 1965, federal matching funds have extended to treatment, without durational limit, for mental illness in public or private general hospitals. 42 U.S.C. § 1396d(a)(1) (1976 & Supp. II 1978). Congress accomplished this change by eliminating that portion of the prior exclusion based on a diagnosis of mental illness and residence in any medical institution. *See* S. REP. NO. 404, 89th Cong., 1st Sess. 20 (1965), *reprinted in* [1965] U.S. CODE CONG. & AD. NEWS 1943, 2084 [hereinafter cited as S. REP. NO. 404].[3] Since 1965 Congress also has covered under Medicaid the aged mentally ill in public or private psychiatric hospitals. 42 U.S.C. § 1396d(a)(14) (1976 & Supp. II 1978).

Congress, however, continued in 1965 to exclude from coverage those mentally ill persons (other than the aged) confined in public or private psychiatric hospitals: "such term [medical assistance] does not include— . . . (B) any

[3] In 1960 Congress had modified the exclusion of care for mental illness in general (non-psychiatric) hospitals by amending section 6 of the Act, 42 U.S.C. § 306, so that the denial of federal funds for care for an aged individual "diagnosed" as mentally ill and "in a medical institution as a result thereof" did not apply for the first 42 days. Pub. L. No. 86-778, § 601(f)(2), 74 Stat. 991.

such payments with respect to care or services for any individual who has not attained 65 years of age and who is a patient in an institution for . . . mental diseases." 42 U.S.C. § 1396d(a)(17)(B) (1976 & Supp. II 1978). Congress has maintained this exclusion, except with respect to children up to age 22 in public or private psychiatric hospitals. Pub. L. No. 92-603, § 299B, 86 Stat. 1460-61, 42 U.S.C. § 1396d(a)(16) (1976). Persons aged 22-64 in public or private mental hospitals do not receive Medicaid.[4]

C. The SSI Program

Congress established the SSI program in 1972 to provide federal cash welfare benefits to "[e]very aged, blind, or disabled individual who is determined under [42 U.S.C. §§ 1382-1382e] to be eligible on the basis of his income and resources." 42 U.S.C. § 1381a (1976). Disability can be based on either "physical or mental impairment. . . ." 42 U.S.C. § 1382c(a)(3)(A) (1976).

SSI is a comprehensive program with a federal definition of eligibility and direct federal payments to eligible persons. It is "a single uniform system of welfare benefits." Secretary's Brief at 6. *See* 42 U.S.C. § 1381 (1976); S. REP. NO. 1230, 92d Cong., 2d Sess. 75 (1972) [hereinafter cited as S. REP. NO. 1230]; 117 CONG. REC. 21350 (1971) ("The Federal government will take over full responsibility from the States for [income maintenance for] the aged, blind and disabled. If they choose,

[4] They do receive Medicaid, however, for their medical institution costs for the calendar month in which they enter a mental hospital. *See* p. 31 *infra*.

the individual States may supplement the above.") (remarks of Rep. Lloyd).[5]

The regular monthly SSI payment to a non-institutionalized individual is currently $238. SOCIAL SECURITY ADMINISTRATION, SSI CLAIMS MANUAL § 13127 (1980). Section 1611(e)(1), however, creates different payment rules for institutionalized persons, providing a $25 monthly SSI grant for the residents of medical institutions, except appellees.

Section 1611(e)(1) provides:

> (A) Except as provided in subparagraph (B) and (C), no person shall be an eligible individual or eligible spouse for purposes of this subchapter with respect to any month if throughout such month he is an inmate of a public institution.
>
> (B) In any case where an eligible individual or his eligible spouse (if any) is, throughout any month, in a hospital, extended care facility, nursing home, or intermediate care facility receiving payments (with respect to such individual or spouse) under a State plan approved under subchapter XIX of this chapter [Medicaid], the benefit

[5] The "supplement" Rep. Lloyd referred to provides for states to pay additional, 100% state-funded benefits to persons receiving the 100% federal SSI grant. *See, e.g.*, 42 U.S.C. § 1382e (1976 & Supp. II 1978). Such state supplementary grants to persons receiving SSI formed the only context in which Congress intended that state cash assistance obligations to the indigent aged, blind and disabled would continue. The suggestion (Secretary's Brief at 31) that Congress otherwise left to the states any responsibility for income maintenance for the indigent aged, blind and disabled is without support. *See also* 117 CONG. REC. 21385 (1971) (remarks of Rep. Minish); 118 CONG. REC. 32903-904 (1972) (remarks of Sen. Long); *id.* at 36805 (remarks of Sen. Long); *id.* at 36917 (remarks of Rep. Mills). The contrary dictum on this point in *Baur v. Mathews*, 578 F.2d 228, 233 (9th Cir. 1978) (*see* Secretary's Brief at 31) is simply wrong, and has no basis in the legislative history.

> under this subchapter for such individual for such month shall be payable (i) at a rate not in excess of $300 per year [$25/month] . . . .

The $25 grant is for small personal needs and subsistence items not provided by the medical institution. The Senate Report says:

> People who are residents of certain public institutions, or hospitals or nursing homes which are getting Medicaid funds, would get benefits of up to $25 a month (reduced by nonexcluded income). For these people most subsistence needs are met by the institution and full benefits are not needed. Some payment to these people, though, would be needed to enable them to purchase small comfort items not supplied by the institution. No supplemental security benefits will be paid to an individual in a penal institution. S. REP. NO. 1230, *supra*, at 386.

See also H.R. REP. NO. 231, 92d Cong., 1st Sess. 150 (1971), *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 4989, 5136 [hereinafter cited as H.R. REP. NO. 231]. With the exception of those persons whom section 1611(e)(1) excludes from benefits, all indigent aged, blind or disabled legal residents of the fifty states and the District of Columbia are eligible for the federal SSI grants, unless they leave the United States or refuse to comply with administrative cooperation requirements. 42 U.S.C. §§ 1381a, 1382 (1976).

D. The SSI Statute Discriminates Against Mentally Ill Persons.

Subsection (A) of section 1611(e)(1) makes ineligible for SSI benefits an "inmate of a public institution," except as otherwise provided in subsections (B) and (C). Subsection (B) undoes the exclusion for residents of all public medical institutions on whose behalf the institution receives Title XIX (Medicaid) payments. All such

persons are eligible for a $25 monthly SSI payment. Since Medicaid excludes persons aged 22-64 in mental hospitals and includes all other medical institution residents, the latter are reincluded and made eligible for SSI by subsection (B). The replication of the Medicaid eligibility scheme by the SSI program is not, however, complete. Persons aged 22 through 64 and residing in *private* mental hospitals (and ineligible for Medicaid) neither are excluded by section 1611(e)(1)(A) nor fall under the reduced benefit ($25 per month) provision of section 1611(e)(1)(B) for Medicaid recipients; they receive full SSI benefits.

Section 1611(e)(1) thus makes eligible for SSI benefits: residents of public or private general hospitals (including residents being treated for mental illness); residents of public or private intermediate care or skilled nursing care facilities (including institutions for the mentally retarded); residents (aged under 22 or over 64) of public or private mental hospitals; and residents of *any* public or private "medical institution." The exception is appellees—those residents aged 22-64 in a public mental hospital. 42 U.S.C. § 1382(e)(1); 42 U.S.C. §§ 1396d(a)(1), (4), (14), (15), (16), (17), 1396d(d), (h) (1976 & Supp. II, 1978).

The Secretary characterizes the exclusion/reinclusion scheme as a "blanket exclusion" of public institution residents with a "limited exception" for residents of Medicaid institutions. Secretary's Brief at 6-7. That description is faulty because it ignores the substance of the incorporation that section 1611(e)(1) effects.

The substance of what is incorporated by section 1611(e)(1) is Congress' exclusion of residents of public *non-medical* institutions from coverage under the Social Security Act's medical assistance provisions, and its in-

clusion of residents of public and private *medical* institutions (except for the mentally ill appellees). The classes thus included for and excluded from SSI benefits are not defined by their respective sizes (as suggested by the Secretary's reference to a "blanket exclusion" and "limited exception"), or by a public/private institution dichotomy. Rather, section 1611(e)(1) defines SSI eligibility primarily by reference to the same distinctions that define Medicaid eligibility. The first is residence in a medical (as opposed to non-medical) institution—a distinction having validity in programs that are designed to provide benefits for those who are medically disabled and that seek to alleviate or remove such disabilities where possible. The second distinction excludes certain mentally ill residents of medical institutions, while all other similarly situated residents of public or private medical institutions are included. This latter distinction is valid in the Medicaid program, but is not rationally related to any legitimate governmental purpose in the SSI program. *See* pp. 19-32 *infra*.

The Secretary says that section 1611(e)(1) is "facially neutral" regarding "mental health" (Brief at 22). She describes the exclusion of appellees from SSI benefits as "based not on mental health but rather on the patient's age and the type of public institution in which he is receiving treatment." Secretary's Brief at 20. These statements also represent a refusal to examine the substance of the statute.

Such an examination shows that section 1611(e)(1)(B)'s reinclusion of residents of Medicaid-funded medical institutions replicates the distinction created by the Medicaid statute between medical institution residents in general and the class of mentally ill patients specifically. The Medicaid exclusion by statutory definition re-

lates to "mental" hospital patients, 42 U.S.C. § 1396d(a)(17)(B), and it is thus public *mental* hospital residents aged 22-64 who are excluded from SSI. Since those same persons, aged 22-64, in public *non-mental* hospitals or medical facilities do receive benefits, the crucial identifying factor in the definition is the adjective "mental." A statute that excluded from a public benefit program 22-64 year old residents of public medical institutions for women, while including, *inter alia*, 22-64 year old residents of public medical institutions for men would be identified as creating a gender-based discrimination. *See Craig v. Boren*, 429 U.S. 190 (1976); *Stanton v. Stanton*, 421 U.S. 7 (1975).

Moreover, the origin of the incorporated exclusion reveals it as based on diagnosis of mental illness. *See* pp. 10-11 *supra*. Neither the subsequent narrowing of the exclusion nor the inclusion of some mentally disabled persons in the SSI program alters the nature of the discrimination. *See Nyguist v. Mauclet*, 432 U.S. 1, 7-9 (1977); *Califano v. Goldfarb*, 430 U.S. 199, 216 (1977); *Mathews v. Lucas*, 427 U.S. 495, 504-505 n.11 (1976); *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 169, 172 (1972). Nor does appellees' eligibility for SSI "in the first place" because of their mental disabilities constitute either a "tautology" or an inconsistency altering the nature of the discrimination. Secretary's Brief at 20 n.13. *See also id.* at 19. When a statute creates "eligibility" that is actually illusory because it is retracted elsewhere, the denial of eligibility is no less complete and no less invidious. *See United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973); *Griffin v. Richardson*, 346 F. Supp. 1226 (D. Md. 1972), *aff'd mem.*, 409 U.S. 1069 (1972).

In any event, regardless of whether the exclusion here is viewed as discriminating against the mentally ill, or as using a capricious mixture of mental illness, type of institution and age as the exclusionary factors, it violates appellees' rights under the equal protection component of the due process clause of the Fifth Amendment, since it is not rationally related to any legitimate governmental interest.[6]

II.

THE EXCLUSION OF APPELLEES FROM THE $25 MONTHLY GRANT FOR THE PERSONAL NEEDS OF INDIVIDUALS IN MEDICAL INSTITUTIONS IS NOT RATIONALLY RELATED TO ANY LEGITIMATE GOVERNMENTAL INTEREST AND THEREFORE VIOLATES THE EQUAL PROTECTION COMPONENT OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

A. The Exclusion Of Appellees Is Unrelated To Any Governmental Interest In The SSI Program.

The minimum equal protection standard this Court has applied requires that a challenged classification bear a rational relationship to a legitimate governmental interest. *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 172 (1972). In applying that standard the

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[6] Even if the legislation is properly viewed as discriminating against the mentally ill *qua* mentally ill, it is still appropriate to examine it first under the "rational basis" test, rather than some form of heightened scrutiny, where, as here, the statutory classification is unrelated to any governmental interest, and the "rational basis" test is adequate to invalidate the exclusion. *See James v. Strange*, 407 U.S. 128, 134, 140 (1972); *Jackson v. Indiana*, 406 U.S. 715, 737, 739 (1972); *Rinaldi v. Yeager*, 384 U.S. 305, 307-308 (1966). The rational basis test also was used in the first cases involving gender discrimination, which was later subjected to heightened scrutiny. *Compare Reed v. Reed*, 404 U.S. 71 (1971) *with Wengler v. Druggists Mutual Ins. Co.*, 100 S. Ct. 1540 (1980).

Court normally has looked first to those governmental interests, if any, that the legislature has articulated or that are related to the purposes of the statute creating the classification. *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 (1976); *Johnson v. Robison*, 415 U.S. 361, 374-75 (1974); *Reed v. Reed*, 404 U.S. 71, 76 (1971).

Congress itself did not indicate in the SSI statute, committee reports or debates any interests or objectives that the classification at issue here might serve. The Secretary concedes this point when she states that "Congress did not articulate any particular rationale for the classification . . . ." Secretary's Brief at 33.

The Secretary also fails to present any rationale related to the purposes of the SSI statute. Under the SSI program Congress assumed full responsibility for income maintenance for indigent aged, blind and disabled persons, including those persons in medical institutions. The exclusion of appellees is unrelated to the purposes of SSI, particularly since appellees' need for the benefits is the same as, if not greater than the needs of other aged, blind and disabled persons. *See* pp. 22-23 *infra*.

Since the exclusion has no basis that is related to the purposes of the SSI program, the Secretary attempts to support her position by citing general authority for the propositions that legislative classifications must be given deference, and that legislatures must be given great latitude in drawing necessary statutory lines. Secretary's Brief at 17-18, 30, 32. The deference due most legislative classifications, however, does not immunize from judicial review those classifications that are unrelated to any legitimate governmental purpose. *See, e.g., Mathews v. DeCastro*, 429 U.S. 181, 185 (1976) (such review "not toothless"); *James v. Strange*, 407 U.S. 128 (1972).

Nor does the mere existence of a "line" that creates a classification make the classification rational simply by reference to the general rubric of "line-drawing." The congressional need to draw some lines defining the particular problems it was addressing does not justify the arbitrary character of the exclusion of appellees. Such necessary lines[7] exist in the SSI statute; they shape the limits of the program by, *e.g.*, the definition of disability for persons under 65, the definition of eligibility in terms of income and resources, and the general differentiation, incorporated from Medicaid, between medical and non-medical institutions. Appellees—indigent, disabled residents of medical institutions—fall within the contours of the program shaped by all these lines; appellees "thus satisfy the general eligibility requirements under the SSI program." Secretary's Brief at 7.

The invidious discrimination against appellees results from an irregular and arbitrary concavity in the shape of the SSI program, rather than from a line necessitated by the nature and purposes of the program. *See Jimenez v. Weinberger*, 417 U.S. 628 (1974); *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973). The Secretary simply fails to explain why there is a necessary or rational line in the SSI program with indigent disabled public mental hospital patients aged 22-64 on one side, and all other indigent aged, blind or disabled patients in medical institutions on the other. This rococo design may bear a resemblance to the 28-

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[7] *See, e.g., Weinberger v. Salfi*, 422 U.S. 749 (1975) (line establishing minimum duration of relationship, to avoid granting benefits based on sham marriage); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955) (lines establishing qualifications for professional licensing).

sided map in *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), but it resembles no line this Court has ever sanctioned as necessary line-drawing.

The Secretary also relies (Brief at 13) on the principle that the legislature may "take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind," *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955), and that it can "concentrate limited funds where the need is likely to be greatest," *Califano v. Boles*, 443 U.S. 282, 296 (1979). Given the contours and breadth of the SSI statute, and the narrow exclusion of the particular class of appellees for reasons unrelated to the legislative purpose or the primary definitions of eligibility, the concept of incrementalism sanctioned by *Williamson* is irrelevant.

Nor is there any indication that Congress, in making the distinction at issue, was or could have been concentrating funds where needed or differentiating on the basis of the acuteness of the problems it was addressing. The legislative history is silent, and the Secretary concedes that there is no conceivable difference with regard to need for SSI between appellees and other residents of medical institutions. "[T]he statutory classification does not exclude [appellees] because they were thought to be less needy." Secretary's Brief at 32.[8]

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[8] The Secretary had earlier conceded this proposition in her brief in *Watkins v. Califano*, No. 78-334 (E.D. Pa., filed March 1, 1979), an identical challenge to the exclusion of mentally ill persons by section 1611(e): "It is undoubtedly true that although plaintiffs lack Medicaid eligibility, they have personal needs which are similar, if not identical, to those of institutionalized individuals who are covered by Medicaid [and therefore receive SSI benefits]." Memorandum of Points and Authorities in Support of Defendant's Motion for Summary Judgment at 7.

Where the legislature actually has made a judgment about differing needs, even though an imprecise one, this Court normally has deferred to that judgment. *See, e.g., Califano v. Aznavorian*, 439 U.S. 170, 178 (1978) ("The needs to which this [the SSI] program responds might vary dramatically in foreign countries."). Here, however, the financial need of appellees is conceded to be the same as that of others who do receive the $25 per month grant. Appellees' needs may in fact be greater than those of most other eligible residents of medical institutions. Many commentators have described the desocialization process experienced by institutionalized individuals, a process that exacerbates mental disability and prolongs mental hospitalization. Both the deprivation of personal possessions (personal clothing to wear inside and outside the hospital, writing paper, combs and hairbrushes, toiletries and cosmetic supplies), and the absence of even small monetary transactions significantly reinforce this syndrome.[9]

In analogous circumstances where excluded and included institutionalized persons have been identically situated with respect to the purposes of the statute at

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[9] E. GOFFMAN, ASYLUMS: ESSAYS ON THE SOCIAL SITUATION OF MENTAL PATIENTS AND OTHER INMATES 19-20 (1961); Benson & Hansell, *Interrupting Long-Term Patienthood: A Cohort Study*, 24 ARCHIVES GENERAL PSYCH. 238 (1971); Cushing & Morgan, *The Personal Possessions of Long-Stay Patients in Mental Hospitals*, 1 SOC. PSYCH. 151, 153, 156-57 (1966) (describing the items listed in the text as "equipment which most people would regard as the minimum essential for a civilized life. . . ."); Ritchey, *Activity Groups Help Long-Term Patients Solve Everyday Problems*, 22 HOSPITAL & COMMUNITY PSYCH. 335-36 (1971); Williams, *Money and the Therapeutic Process*, 18 CANADA'S MENTAL HEALTH 20 (1970); Wolfensberger, *The Principle of Normalization and Its Implications to Psychiatric Services*, 127 AM. J. PSYCH. 291, 295 (1970).

issue, this Court has applied "rational basis" equal protection principles to invalidate comparable discrimination. *See Jackson v. Indiana*, 406 U.S. 715 (1972), and *Baxstrom v. Herold*, 383 U.S. 107 (1966) (more lax commitment procedures and more stringent release standards applied to one group of alleged mentally disabled persons violated equal protection). *See also O'Brien v. Skinner*, 414 U.S. 524, 529-30 (1974) (denial of vote to some pre-trial detainees, but not to others similarly situated, violated equal protection); *Delafose v. Manson*, 385 F.Supp. 1115 (D. Conn. 1974) (denial of equal protection to grant small "hospital pay" to prisoners hospitalized for physical ailments but to deny it to prisoners hospitalized for mental problems)[10]; *Vecchione v. Wohlgemuth*, 377 F.Supp. 1361 (E.D. Pa. 1974), *aff'd*, 558 F.2d 150 (3d Cir.), *cert. denied*, 434 U.S. 943 (1977) (distinctions in state procedures for seizing mental patients' assets and applying them to the cost of treatment denied equal protection when the procedures varied based on the amounts of assets and competent patients had no opportunity for a hearing). The exclusion of appellees, like the classifications above, is not rationally related to any governmental interest in the program in which it occurs.

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[10] The analogy for equal protection purposes between this case and such cases as *Jackson*, *Baxstrom*, *O'Brien* and *Delafose* is not meant to suggest that relief in this case extends to persons in mental hospitals who are in correctional department custody. Mentally ill persons placed in mental hospitals by a correctional department remain ineligible for SSI so long as they are under the jurisdiction of the correctional department. *See* SOCIAL SECURITY ADMINISTRATION, SSI CLAIMS MANUAL § 12214 (1980).

B. There Is No Legitimate Governmental Interest Served By Incorporating Into The SSI Program The Medicaid Program's Exclusion Of Appellees.

The closest the Secretary comes to asserting a governmental interest in the exclusion of appellees is her statement that "Congress simply drew the line in providing SSI payments to residents of public institutions at those for whom the federal government has already assumed partial financial responsibility [through Medicaid], while leaving to the states and local governments the duty of providing for the needs of" appellees. Secretary's Brief at 30. *See also id.* at 27-28. Elsewhere she says that the "sole question" here is "whether it was constitutionally permissible . . . to incorporate the same distinction upheld in *Legion* [*v. Richardson*, 354 F.Supp. 456 (S.D. N.Y.), *aff'd mem., sub nom. Legion v. Weinberger*, 414 U.S. 1058 (1973)] when it enacted the SSI program." Secretary's Brief at 17.

Each of these formulations mischaracterizes the incorporated Medicaid eligibility scheme that serves to exclude appellees from SSI. *See* pp. 30-31 *infra*. Each formulation utilizes the mischaracterization to make the same argument: appellees may be constitutionally excluded from SSI benefits because they have been—or for the same reasons that they have been—constitutionally excluded from Medicaid benefits.

This argument, unembellished by any rationale for the linkage between the two programs, is one of constitutional conclusion, not justification. It contains no assertion of legislative purpose at all, but only one of plenary congressional power to "piggyback" governmental action in one program onto governmental action in another, without any showing that the purposes or nature of the programs justify such treatment. The argument reduces to an assertion that Congress "drew

the line" at those to whom it gave benefits and withheld SSI from those to whom it gave no benefits.

Congress' good and constitutionally sufficient reasons, expressed in 1950 and 1965, for refusing to reimburse the states for costs of medical treatment of public and private mental hospital patients have no necessary application to the exclusion of appellee public mental hospital patients from the comprehensive income maintenance program enacted in 1972 to meet personal, non-medical needs. The rationality of the SSI exclusion cannot be measured by the purposes of the Medicaid program, but rather must be evaluated in the context of the SSI program. *See United States Department of Agriculture v. Murry*, 413 U.S. 508 (1973) (valid dependency provisions in the Internal Revenue Code were incorporated into a provision of the Food Stamp Act; the food stamp provision was unconstitutional because it was unrelated to the congressionally defined purposes of the Food Stamp Program); *Mathews v. Lucas*, 427 U.S. 495 (1976) and *Jimenez v. Weinberger*, 417 U.S. 628 (1974) (state laws regarding inheritance rights of illegitimate children were incorporated into Title II of the Social Security Act in determining public benefit rights; the Social Security provisions were not insulated from equal protection scrutiny); *Medora v. Colautti*, 602 F.2d 1149, 1153 (3d Cir. 1979) (different welfare programs, to meet rational relationship test, "must independently assess need. . . ."); *Williams v. Wohlgemuth*, 366 F.Supp. 541, 548 (W.D. Pa. 1973), *aff'd mem.*, 416 U.S. 901 (1974) (equal protection denied in a general assistance program that distinguished between two groups of unemancipated minors and excluded one from benefits; the state's defense based on an ancillary child welfare services program which met different needs was rejected: "the gears of these two programs do

not mesh [and] they serve two different purposes."). *See also Koe v. Califano*, 573 F.2d 761 (2d Cir. 1978) (dictum).[11]

The reasons that constitutionally justify the exclusion of appellees from Medicaid do not in fact justify the denial of SSI benefits. In excluding public and private mental hospital patients from Medicaid, Congress acted on the basis of its reasonable and expressly articulated reluctance to subsidize the states in funding the extremely expensive institutional costs of medical care in certain institutions treating mental patients, and its determination that the provision of such medical care was a state responsibility. *See Legion v. Richardson*, 354 F.Supp. at 459; Secretary's Brief at 29-30. When these

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[11] In *Koe*, aged public mental hospital patients were threatened with loss of both Medicaid and SSI benefits because the hospital in which they resided faced loss of its accreditation. They sued to enjoin the threatened SSI termination; the Medicaid exclusion was not challenged. The Second Circuit did not reach the merits of their claim, but nevertheless stated:

> Plaintiffs' counsel points out that a monthly stipend of twenty-five dollars, while inconsequential to most, assumes a very different light in the eyes of an involuntarily institutionalized mental patient with no other source of income. The hospital provides food and shelter, but for plaintiffs and their counterparts it is only the [$25 monthly] SSI payments that make possible the purchase of personal items essential to any human existence transcending bare subsistence. The loss of such payments imposes a readily understandable burden; less obvious but perhaps no less significant are the uncertainty and feelings of rejection inflicted . . . on those who have so little and are mentally ill. *Id.* at 763 n.5.

The Second Circuit saw no analogy to the Medicaid exclusion, even though it recognized, *id.* at 763 n.2, that it had upheld that exclusion (for patients 22 through 64 in mental hospitals) just eight months previously in *Woe v. Mathews*, 408 F.Supp. 419 (E.D. N.Y. 1976), *aff'd mem., sub nom. Woe v. Weinberger*, 562 F.2d 40 (2d Cir. 1977), *cert. denied*, 434 U.S. 1048 (1978).

justifications are evaluated in terms of the purposes of the SSI program, and Congress' findings with respect to it, they provide no rational basis for the incorporation that denies appellees the $25 monthly grant.

The Medicaid exclusion was based in part on the large potential cost of subsidizing the states' provision of medical care in psychiatric hospitals. There is no suggestion in the legislative history that Congress considered the provision of the $25 monthly benefit to appellees to be too expensive for the federal government to fund. The cost of providing such aid is insubstantial in the context of the SSI program. *See* Motion to Affirm at 18-19. Moreover, the *monthly* SSI benefit for a person in a medical institution is less than the federal share for Medicaid mental hospital costs for each patient *day*.[12]

Nor can the SSI exclusion be defended because Congress in 1950 and 1965 considered "medical care" or "treatment" in mental hospitals to be a state respon-

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[12] In 1976 the average daily per patient hospital expense in psychiatric hospitals was $49.61. U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1978, at 109 (1978). The figure presumably is higher today. The federal share of such cost is a minimum of 50%. 42 U.S.C. § 1396d(b) (1976). The Secretary appears no longer to press a fiscal argument. Having reduced her estimate of the maximum conceivable cost of providing SSI to appellees from $95 million (Jurisdictional Statement at 7 n.8) to $30 million (Reply Memorandum for Appellant at 3), she makes no reference to any figure in her brief. And her lower estimate of $30 million itself incorrectly assumes that all such persons in mental hospitals would receive benefits as the result of an affirmance. For the majority of patients this is not true. Since the median length of stay in mental hospitals is 41 days, *see Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1198 n.17 (1974), many patients are not hospitalized for a full calendar month and thus continue to receive benefits under § 1611(e)(1). Of the remainder, many are not needy or otherwise are not excluded by § 1611(e)(1). *See* Motion to Affirm at 18-19.

sibility that it did not want to subsidize.[13] That congressional determination did not carry with it any companion view concerning the personal, non-medical needs of the hospital residents. Hypothetically, Congress could have excluded all persons in medical institutions from SSI benefits based on an assumption that such individuals had less need for cash assistance, or that meeting such needs for persons in any public medical institution was a responsibility already fulfilled by the states. *See Richardson v. Belcher*, 404 U.S. 78 (1971). Congress did not do so, nor did it structure the SSI program or make any finding consistent with a hypothesis that state responsibility should or did extend to income maintenance for medical institution residents. Rather, section 1611(e)(1) is explicitly based on a contrary recognition: that residents of public and private medical institutions have a significant, albeit reduced, need for federal income maintenance.

The institutions provide for "most subsistence needs," S. REP. NO. 1230, *supra*, at 386, and in particular food, shelter and medical treatment. 20 C.F.R. § 416.231(b)(1)

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[13] *See, e.g.*, H.R. REP. NO. 1300, *supra*, at 42; H.R. REP. NO. 213, 89th Cong., 1st Sess. 128 (1965); S. REP. NO. 404, *supra*, at 73, *reprinted in* [1965] U.S. CODE CONG. & AD. NEWS 1943, 2084. Moreover, while Congress felt that providing such medical care had been a traditional responsibility of the states, Congress never assumed that medical care and treatment were "being fully provided" by the states. *See* Secretary's Brief at 27. Rather, Congress considered the states' provision of mental hospital care inadequate. *See generally, e.g.*, S. REP. NO. 404, *supra*, at 145-46, *reprinted in* [1965] U.S. CODE CONG. & AD. NEWS 1943, 2085-86; 106 CONG. REC. 17990-18000, 18027-50 (1960) (remarks of Sens. Long, Yarborough, Ervin, Morse). *Cf.* S. REP. NO. 416, 96th Cong., 1st Sess. 19 (1979), *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS 1936, 1949 ("In the words of one mental health expert, '100 years of bad institutional practices is long enough to wait for the State[s] to have sorted out the problems for themselves.' ").

(1980). Section 1611(e)(1), in contrast, is explicitly designed to enable residents of medical institutions to meet their remaining subsistence and personal needs—for *e.g.*, reading material, non-institutional clothing, pay phones, stationery, postage, permitted transportation, cosmetics and personal toiletries.[14] To the extent that some states ever may have provided a small grant for such needs of residents of medical institutions, Congress in section 1611(e)(1) has now assumed that responsibility.

The Secretary hypothesizes a general linkage between Medicaid and SSI to support her argument. The hypothesis of a general congruence between eligibility requirements for the two programs is incorrect. Congress did not make eligibility in the two programs congruent—logically enough, since the purposes of the programs are so different. Private mental institution residents aged 22 through 64 get SSI, even though they are not eligible for Medicaid. *See* p. 16 *supra*. Not all Medicaid recipients outside institutions receive SSI, and not all SSI recipients outside institutions receive Medicaid. *See, e.g.*, 42 U.S.C. §§ 1396a(a)(10)(C), 1396a(f) (1976). In addition, residents of Puerto Rico, in medical institutions or in the community, are eligible for

[14] Congress has differentiated the provision of money and personal possessions from institutional care and expenses in additional ways. Items charged to the personal funds of patients must be differentiated from the costs included in extended care institutional reimbursement programs. Act of Oct. 25, 1977, Pub. L. No. 95-142, § 21(b), 91 Stat. 1207; Act of June 13, 1978, Pub. L. No. 95-292, § 8(c), 92 Stat. 316. Patients must be allowed to have personal clothing and possessions except to the degree medically contraindicated. 42 C.F.R. §§ 405.1121(k)(13), 442.311(k), 442.404(k) (1979). Personal possessions include "books, pictures, games, radios, arts and crafts materials, religious articles, toiletries, jewelry, and letters." 42 C.F.R. § 442.436 (1979).

Medicaid, 42 U.S.C. § 1301 (1976 & Supp. II 1978), but not SSI. *Califano v. Torres*, 435 U.S. 1 (1978).

The Secretary hypothesizes that the exclusion of appellees reflected a congressional determination to grant aid only to those who receive "partial" or "significant" federal Medicaid support for medical institutional care. Secretary's Brief at 27-28, 30. This argument misstates the coverage of the Medicaid program. Under 42 C.F.R. §§ 435.1008(b), 436.1004(b) (1979), the Medicaid program covers mental hospital care furnished to an individual aged 22-64 during the month in which he becomes a patient in the mental hospital. *See also* U.S. DEP'T OF HEALTH AND HUMAN SERVICES, MEDICAL ASSISTANCE MANUAL § 4-50-20G, *reprinted in* [1979] 3 MEDICARE AND MEDICAID GUIDE (CCH) ¶ 14,361.61 at 6214. Thus the "line" the Secretary posits between appellees and persons for whom the federal government has already assumed "partial financial responsibility" through Medicaid does not exist. Secretary's Brief at 30.[15]

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[15] This significant federal subsidy to mental hospitals on behalf of appellees undercuts any suggestion that the denial of SSI might serve to encourage persons to leave facilities that Congress might feel do not "meet certain minimum standards." Secretary's Brief at 28 n.20. The Secretary "do[es] not press" the suggestion for the additional reason that "some residents of public institutions may not have a choice of facilities," *e.g.*, they are involuntarily committed to such institutions. *Id.* A majority of public mental hospital residents are involuntarily committed. *See Jackson v. Indiana*, 406 U.S. 715, 737 n.22 (1972); B. ENNIS & L. SIEGEL, THE RIGHTS OF MENTAL PATIENTS 15 (1973). The categorical statutory denial

(Footnote continued on following page)

There is no rational basis for denying the $25 monthly SSI benefit to appellees because they do not receive Medicaid in months throughout which they are in an institution. The exclusion is simply an aberration that, as the classification in *James v. Strange*, 407 U.S. 128, 141-42 (1972), "embodies elements of punitiveness" and "blight[s] . . . the hopes of indigents for self-sufficiency and self-respect."

C. The Exclusion Of Appellees, Which Has No Rational Relationship To Any Legitimate Governmental Interest, Can Only Be Understood To Reflect Societal Antipathy And Resulting Congressional Inattention.

The denial of SSI to appellees bears no rational relationship to any legitimate governmental interest that the Secretary can adduce. Rather, the exclusion can be understood best as an invidiously discriminatory product of congressional inattention to appellees and their needs. That inattention in turn reflects the political powerlessness of the mentally ill and the societal antipathy that has been directed towards them.[16]

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[15] *continued*
of Medicaid (and SSI) eligibility does not, in any event, turn on the quality of the particular mental hospital. In addition, Congress hardly could have excluded appellees in order to encourage them to move to alternative types of facilities, since it has recognized that there were inadequate alternative placements. H.R. REP. NO. 248, 89th Cong., 1st Sess. 4 (1965).

[16] The differential treatment of mentally ill persons in the Social Security Act medical assistance programs incorporated by § 1611(e)(1) has been characterized as resulting from historical discrimination, historical accident, political powerlessness and antipathy. *See* 106 CONG. REC. 17990, 17998, 18027, 18039-44 (1960) (remarks of Sens. Long, Yarborough, Ervin, Morse); *Social Security Medical Care for the Aged Amendments: Hearings on H.R. 1185 Before the Senate Comm. on Finance*, 88th Cong., 2d Sess. 82 (1964) (Program exclu-

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Congress is, of course, presumed to intend the results that a statute facially commands. *See United States v. American Trucking Associations, Inc.*, 310 U.S. 534, 543 (1940). In this sense Congress obviously "intended" to deny appellees the SSI benefits it extended to virtually all other residents of medical institutions. In measuring whether a statutory discrimination is the product of a purposeful and rational congressional scheme, however, this Court has looked not only for some articulation of governmental purpose, but also for an indication in the legislative history that legislators had some "recognition" or "specific knowledge" of the effect of the legislation. *Schlesinger v. Ballard*, 419 U.S. 498, 508 n.12 (1975). *See also Johnson v. Robison*, 415 U.S. 361, 381 (1974) ("quantitative and qualitative distinctions, expressly recognized by Congress. . . ."); *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 191 (1979) (Rehnquist, J., concurring) ("considered product of a legislature").

In this case there is no such "recognition" or "specific knowledge." On the contrary, Congress appears to have enacted section 1611(e)(1) heedless of its consequences for appellees. The legislative history not only provides no reason for the exclusion, but also is essentially silent as to its existence.

This silence is unsurprising. Statements of legislative hostility are rare, even where, as here there is societal antipathy towards the group against whom the legisla-

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[16] *continued*
sions of mentally ill go "back to the theory that historically you didn't treat mental people; you just locked them up as criminals to separate them from society. . . .") (statement of Sen. Long); 111 CONG. REC. 15037 (1965), *reprinted in* [1965] U.S. CODE CONG. & AD. NEWS 2287 (remarks of Sen. Long).

tion discriminates. That is why the Court has referred to "infer[ring] antipathy." *Vance v. Bradley*, 440 U.S. 93, 97 (1979). Where, as here, a statute discriminates against a politically powerless group towards whom there is societal antipathy, legislative silence speaks loudly, and speculation regarding fictitious purposes is likely to obscure the reality of legislative inattention.[17]

The Secretary argues that Congress clearly understood that section 1611(e)(1) would deny benefits to appellees and therefore that the provision does not reflect congressional inattention to appellees' situation. In support of this contention she relies on: (a) the first sentence of the Senate and House Committee Reports; (b) certain 1972 Medicaid amendments; and (c) witness testimony at the Senate hearings. Secretary's Brief at 13-14, 33-35. In each case her reliance is misplaced.

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[17] Antipathy and political powerlessness are also denominators of "heightened scrutiny" in the sense the district court and the Secretary use that term. *See* Section III *infra*. The statement in *Vance*, however, that "[t]he Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process," 440 U.S. at 97, indicates that they may be factors informing rational relationship scrutiny as well. *See also Personnel Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 272 (1979); *United States Dep't of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973) ("a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."); *James v. Strange*, 407 U.S. 128, 141-42 (1972) (statute violating equal protection clause "embodie[d] elements of punitiveness."). The Secretary implicitly assumes that there is a single stratum of "heightened" scrutiny, rather than a continuum or range of scrutiny. These cases call that assumption into question, as do the different levels of scrutiny apparently applied to gender-based discrimination, on the one hand, and discrimination against illegitimate children on the other. *Compare Wengler v. Druggists Mutual Ins. Co.*, 100 S. Ct. 1540 (1980) *with Trimble v. Gordon*, 430 U.S. 762 (1977).

The first sentence of the House and Senate reports describing section 1611(e)(1) provides that "[p]eople who are residents of certain public institutions, or hospitals or nursing homes which are getting Medicaid funds, would get" the $25 monthly payment. S. REP. NO. 1230, *supra*, at 386; H.R. REP. NO. 231, *supra*, at 150. By italicizing the words "certain" and "which are getting Medicaid funds" in this sentence (Secretary's Brief at 13, 33), the Secretary has tried through typography rather than analysis to portray "getting Medicaid funds" as modifying "certain public institutions." Only then can she assert, as she does, that "by negative implication this language plainly betokens an intent that residents of some [*sic*; but not all?] public institutions that are not receiving Medicaid funds would not be eligible for the SSI allowance." Secretary's Brief at 34. Even if the Secretary's reading were correct, it would render the report confusing and inaccurate. It is incorrect to say that only residents of "*certain* public institutions . . . which are getting Medicaid funds," S. REP. NO. 1230, *supra*, at 386, (emphasis added) get the $25/month, since all such residents would be eligible under the Secretary's reading. The absence of a comparable statement about "certain" or "all" private institutions becomes misleading as well.[18]

The Secretary's typographical construct is, however, incorrect. The reports' use of disjunctives and punctua-

[18] The Secretary's analysis also ignores another misleading suggestion in the same sentence of the committee report: that if otherwise eligible, residents get SSI if the hospital receives any Medicaid funds, regardless of whether the Medicaid funds are received on behalf of that particular resident. The actual statutory provision ties SSI eligibility to institutional receipt of Medicaid on behalf of the particular resident. § 1611(e)(1)(B).

tion dictates that "getting Medicaid funds" modifies "hospitals or nursing homes," but does not modify "public institutions." *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 338-39 (1979). Thus, "[p]eople who are residents of certain public institutions . . . would get" $25 monthly. This is a correct statement. It does not, however, tell a legislator which of the residents will get benefits, except possibly when read in conjunction with the exclusion in the last sentence of the relevant paragraph in the reports, which specifies that penal institution residents are ineligible. S. REP. No. 1230, *supra*, at 386; H. REP. No. 231, *supra*, at 150.[19]

There is thus no way to read the committee reports as an accurate reflection of the statutory exclusions and inclusions. Consequently there is no basis for this Court to believe that any legislator could have obtained from the reports a "recognition" or "specific knowledge" of the statutory scheme. *Schlesinger v. Ballard*, 419 U.S. 498, 508 n.12 (1975). Also, there was no discussion of section 1611(e)(1) in the floor debates, much less any discussion describing its effect upon appellees.

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[19] The report thus would be consistent with the statute if the "inmate" exclusion in § 1611(e)(1)(A) were limited to penal institution inmates. *See Levings v. Califano*, 604 F.2d 591 (8th Cir. 1979). *Contra, Baur v. Mathews*, 578 F.2d 228 (9th Cir. 1978). Because of the historical equation in the Social Security Act of "inmate" with "resident," however, appellees do not press an argument that the Secretary has misconstrued the statute. We would note, however, that the Secretary has extended SSI benefits to residents of public vocational and educational institutions (*e.g.*, a state residence for deaf children). Such residents are eligible not because they are in Medicaid institutions (they are not), but because the Secretary has categorized them as not being "inmates." 20 C.F.R. § 416.231(b)(3) (1980); SOCIAL SECURITY ADMINISTRATION, SSI CLAIMS MANUAL § 12216 (1980). This suggests that the Secretary believes the legislation and its history do not have the coherence she tries to ascribe to them, or that the Secretary considers the statutory structure irrational, or both.

The Secretary next argues that Congress understood that section 1611(e)(1) denied benefits to appellees because its passage occurred at the same time that Congress extended Medicaid eligibility to children in mental hospitals, 42 U.S.C. § 1396d(a)(16) (1976), Pub. L. No. 92-603, § 299B(a), (b), 86 Stat. 1460-61, and rejected demonstration projects to consider the feasibility of doing the same for persons aged 22-64. Secretary's Brief at 34. The Secretary's assumption—that legislators understood a link between an individual's Medicaid and SSI eligibility, either in general or by reference to the committee reports—is incorrect, as discussed above. Moreover, the provisions the Secretary cites were part of a package of several hundred amendments to several titles of the Social Security Act. In the floor debates numerous legislators noted confusion about the bill's contents because the bill's complexity and length were unsurpassed in congressional experience.[20]

Finally, the Secretary argues that Congress understood the import of the exclusion because "several" witnesses at the Senate hearings "specifically pointed out that one effect" of section 1611(e)(1) would be the denial of SSI to appellees. Secretary's Brief at 34-35. In

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[20] *See* 117 CONG. REC. 21089 (1971) (remarks of Rep. Mills); *id.* at 21383 (remarks of Rep. Podell); *id.* at 21402-403 (remarks of Rep. Randall); 118 CONG. REC. 32470 (1972) (remarks of Sen. Long); *id.* at 32477 (remarks of Sen. Bennett); *id.* at 33092-93 (remarks of Sen. Ribicoff); *id.* at 36914 (remarks of Rep. Mills) (the conference committee considered 583 differences between House and Senate versions of bill). Some legislators explicitly mentioned the impossibility of understanding the interrelationships between provisions of the bill, *id.* at 33681-82 (remarks of Sen. Chiles), or argued that since cash assistance provisions and Medicaid provisions were unrelated, they should be in separate bills, 117 CONG. REC. 21394 (1971) (remarks of Rep. Randall).

fact, there is apparently only one such statement in the thousands of pages of hearings on the massive 1972 amendments.[21] It was contained in part of one sentence in a lengthy, written section-by-section analysis of the bill inserted in the record on behalf of the New York State Department of Social Services. *Hearings on H.R. 1, supra*, at 2180. A passing reference in a single written statement submitted to a committee hearing is not helpful in determining what Congress understood. *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 31 n.20 (1977). The legislative history of section 1611(e)(1) precisely parallels that considered in *Guessefeldt v. McGrath*, 342 U.S. 308, 317 (1952):

> [T]aken as a whole, the testimony on this issue was meagre and unimpressive. It was largely in written form, and therefore less likely to have been seen by or to have had impact on the committee members or to reflect their views. These considerations, taken together with the peripheral character of the problem from the committees' point of view, the consistent failure to appreciate the technical

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[21] The other witnesses cited by the Secretary as noting the exclusion of appellees from SSI in fact did not; rather they assumed that all residents of all medical institutions were eligible for SSI. *See Social Security Amendments of 1971: Hearings on H.R. 1 Before the Senate Comm. on Finance*, 92nd Cong., 1st & 2nd Sess. 3319 (1971-1972) [hereinafter cited as *Hearings on H.R. 1*] (SSI exclusion would occur "unless they are patients in a medical facility."); *id.* at 3257 (SSI exclusion affects persons in "a public institution other than medical institutions . . ."). The Secretary also suggests congressional recognition of the exclusion of appellees on the basis of a committee report issued seven years after passage of the statute. Secretary's Brief at 15 n.8. But elsewhere the same report indicates continuing confusion when it refers to comprehensive SSI coverage of residents of medical institutions: "[a] recipient's monthly SSI benefit standard is reduced to $25 for any month during all of which he is in a medical institution." H.R. REP. NO. 451, 96th Cong., 1st Sess. 55 (1979).

> significance of the term [at issue] in the framework of the Act, and the fact that the matters raised by this testimony were not touched upon in floor debate—all go far to overcome any presumption that the claimant's situation was considered by Congress and rejected.

In sum, Congress appears to have had no recognition of the effect section 1611(e)(1) would have on appellees. That inattention is the only reasonable explanation of how appellees came to be excluded from the $25 monthly SSI benefits extended to all other residents of medical institutions. The invidious discrimination simply reflects inattention to appellees and their needs, rather than the creation of a classification rationally related to any governmental interest.

III.

THE DENIAL OF SSI BENEFITS TO APPELLEES HAS NO SUBSTANTIAL RELATIONSHIP TO ANY IMPORTANT GOVERNMENTAL INTEREST AND THEREFORE VIOLATES THE EQUAL PROTECTION COMPONENT OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

If the Court determines that the exclusion of appellees from SSI eligibility bears a rational relationship to some legitimate governmental purpose, it becomes necessary here to test the exclusion under more stringent standards. The classification discriminates against the mentally ill (*see* pp. 15-18 *supra*), and the district court correctly found that such a discrimination must be subjected to a heightened standard of review. That standard is less rigorous than the "strict" scrutiny to which racial classifications are subjected, but it requires that, to be constitutional, the legislative classification "must serve important governmental objectives and that

the discriminatory means employed must be substantially related to the achievement of those objectives." *Wengler v. Druggists Mutual Insurance Co.*, 100 S.Ct. 1540, 1545 (1980). The instant classification can not meet such a test or any other articulation of a heightened scrutiny standard. The Secretary does not argue that it can; rather, she disputes the test's applicability.

In *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 28 (1973), this Court identified the "traditional indicia of suspectness" as involving a disadvantaged "class . . . saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." In the absence of these political and social disabilities, groups are assumed to be able to protect their interests in the political process, thereby justifying the deference normally given to legislative action. *See Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 272 (1979).

Groups having such disabilities, however, need special judicial protection. There is a "narrower scope for operation of the presumption of constitutionality. . . . [when] prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities. . . ." *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938). *See also Graham v. Richardson*, 403 U.S. 365, 372 (1971).

The mentally ill have all of the indicia of suspectness described in *Carolene Products* and *San Antonio Independent School District*. They historically have been subjected to purposeful unequal treatment[22]; they have been relegated to a position of political powerlessness; and prejudice against them curtails their participation in the pluralist political system and strips them of political protection against discriminatory legislation.

The institutionalized mentally ill indisputably are politically powerless. Most states disenfranchise persons who are civilly committed or "insane." *See* S. BRAKEL & R. ROCK, THE MENTALLY DISABLED AND THE LAW 308, 333 (1971) [hereinafter cited as BRAKEL & ROCK]. Even where some inpatients retain the right to vote, institutional restrictions limit the extent to which the patient can seek to influence the political process. In short, the "mentally ill constitute a minority segment of the polity which is often disenfranchised . . . and which is virtually powerless to improve its circumstances through the political process." *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1229-30 n.153 (1974) [hereinafter cited as *Developments—Civil Commitment*].

The Secretary suggests (Brief at 25) that friends, relatives or organized interest groups will act to protect the interests of mental patients. The stigma applied to

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[22] While earlier attitudes that attributed mental illness to demons or overtly prescribed punishment have faded, severe discrimination against the mentally ill has existed throughout history, and continues currently in a multiplicity of forms. *See* JOINT COMMISSION ON MENTAL ILLNESS AND HEALTH, ACTION FOR MENTAL HEALTH 25-28 (1961) [hereinafter cited as ACTION FOR MENTAL HEALTH]; S. BRAKEL & R. ROCK, THE MENTALLY DISABLED AND THE LAW 1-8 (1971); A. DEUTSCH, THE MENTALLY ILL IN AMERICA (2d ed. 1949).

mental illness, however, inhibits many relatives from making the public identification with the affected group that is necessary for legislative advocacy.[23] Moreover, since any disenfranchised group may have such a modicum of second-hand political power, the Secretary's argument simply amounts to an attack on the formulation of *Carolene Products* and its progeny. The political process from which appellees are excluded, however, envisions that equal political power and access are achieved through the franchise, not through political charity. In *Katzenbach v. Morgan*, 384 U.S. 641, 652 (1966), this Court noted that voting rights legislation enforces the equal protection clause because it "secure[s] . . . non-discriminatory treatment by government—both in the imposition of voting qualifications and the provision or administration of governmental services . . . ." *See also Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (voting is the right that is "preservative of all rights"); *Reynolds v. Sims*, 377 U.S. 533, 562 (1964).[24]

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[23] *Constitutional Rights of the Mentally Ill: Hearings Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 87th Cong., 1st Sess. 9-10 (1961) (statement of Sen. Hruska) [hereinafter cited as *1961 Hearings on Rights of the Mentally Ill*]; *Social Security Medical Care for the Aged Amendments: Hearings on H.R. 1185 Before the Senate Comm. on Finance*, 88th Cong., 2d Sess. 83 (1964) (statement of H.E.W. Secretary Celebrezze); ACTION FOR MENTAL HEALTH, *supra*, at 71-72.

[24] Congress itself has recognized the political powerlessness of the mentally ill as a factor substantially diminishing their ability to obtain equal treatment. *1961 Hearings on Rights of the Mentally Ill*, *supra*, at 52, 171-72 (remarks of Sen. Ervin); *id.* at 231 (remarks of Sen. Keating); 111 CONG. REC. 15037 (1965) (remarks of Sen. Long), *reprinted in* [1965] U.S. CODE CONG. & AD. NEWS 2285, 2287, [reproduced in part in appellees' Motion to Affirm at 23]; *see also* S. REP. NO. 416, 96th Cong., 1st Sess. 19-20, 27 (1979), *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS 1936, 1949-51, 1958.

The mentally ill are subject to social stigma that exacerbates their political powerlessness. This Court has noted the stigmatization inherent in civil commitment. *Vitek v. Jones*, 100 S.Ct. 1254, 1265 (1980); *Addington v. Texas*, 441 U.S. 418, 425-26 (1979). Mental hospitalization generally subjects an individual to "a stigma of inferiority and a badge of opprobrium." *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1127 (1969).[25]

While disenfranchisement alone may justify heightened scrutiny, the combination of stigma and political powerlessness certainly requires application of the *Carolene Products* principle that prejudice against a discrete and insular minority serves to strip that minority of the protection ordinarily obtained through the political processes. *See* District Court opinion, Jurisdictional Statement at 12a. Any ability of a disenfranchised, stigmatized and insular minority to participate in the pluralistic political marketplace is nullified by the unwillingness of other groups to associate with such a minority, identify common political interests, or put aside prejudice to achieve mutual political ends.[26]

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[25] The "social distance"—a sociological measure of rejection and stigma—people feel towards the mentally ill is greater than the distance felt toward the physically ill *or* ex-convicts. Tringo, *The Hierarchy of Preference Toward Disability Groups*, 4 J. SPECIAL EDUC. 295, 300, 304 (1970). *See generally Public Attitudes, supra*, at 10; *In re Ballay*, 482 F.2d 648, 668 (D.C. Cir. 1973).

[26] This problem is exacerbated where, as here, the legislation affects a group identified by stigmatizing criteria that contrast with most legislators' identity. This type of legislative "we-they" identification (white-black; citizen-alien; man-woman; legitimate birth or parenthood-illegitimate) has been common to the classifications to which this Court has applied heightened scrutiny. *See* J. ELY, DEMOCRACY AND DISTRUST 151-64 (1980).

The political and social exclusion of the mentally ill makes them a "discrete and insular minority" in need of special judicial protection. Since a central basis for presuming the constitutionality of legislation challenged under equal protection principles is the equal participation by the affected parties in a neutral political marketplace, the converse conditions make the presumption inapplicable. Heightened judicial scrutiny of the exclusion of appellees therefore is appropriate.[27]

This conclusion is not undercut by the Secretary's reference to other criteria this Court has considered in strict scrutiny analysis. The Secretary asserts that any heightened scrutiny of the exclusion of appellees is inappropriate because mental disability is not an immutable accident of birth and relates to the ability to participate in or contribute to society, citing *Mathews v. Lucas*, 427 U.S. 495, 505 (1976) and *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion). Secretary's Brief at 24. These cases suggest that classifications defined by such characteristics (*e.g.*, race, national origin) are subject to strict scrutiny. As the district court concluded here, however, they do not suggest that a group that meets all of the "traditional indicia of suspectness" articulated in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 28 (1973) is not entitled to some heightened judicial protection short of strict scrutiny.

The Secretary thus errs in considering the criteria on which she relies as dispositive. The groups to which this

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[27] In addition to the cases and law review articles collected in the district court's opinion, Jurisdictional Statement at 13a-14a, *see Developments—Civil Commitment*, *supra*, at 1229-30 n.153.

Court has given special protection do not always meet all of the variously articulated criteria for triggering special scrutiny of discriminatory legislation. Women are not an insular minority. *See Frontiero*, 411 U.S. at 686 n.17. Alienage is not an "immutable characteristic determined solely by the accident of birth." *Frontiero*, 411 U.S. at 686. *See Sugarman v. Dougall*, 413 U.S. 634, 657 (1973) (Rehnquist, J., dissenting). *See also Regents of the University of California v. Bakke*, 438 U.S. 265, 357-59 (Brennan, White, Marshall and Blackmun, JJ.) (1978).[28]

The factual assumptions underlying the Secretary's contention are also open to question. The district court correctly noted that the "accident of birth" criterion reflects constitutional disfavor of classifications based on characteristics that are not within the control of the individual. Jurisdictional Statement at 12a-13a. *See Mathews v. Lucas*, 427 U.S. 495, 505 (1976). For certain types of disabling mental illness, "[r]ecovery from

[28] The functional difference between review under a strict scrutiny test and under a heightened scrutiny test also supports application of heightened scrutiny to classifications disadvantaging the mentally ill. Certain legislative classifications (along lines of *e.g.*, race, religion, national origin) are subject to strict judicial scrutiny because there is a constitutional presumption that such distinctions are irrelevant for virtually all purposes of government. Thus, the existence of such classification is itself normally suspect. Other types of classifications (along lines of *e.g.*, legitimacy of birth or alienage) are not *per se* suspect in the sense of the classifications being inherently invalid legislative functions. To some extent such statuses are in fact necessary creations of legal classification. But because of the factors of political powerlessness, stigma and insularity affecting some groups, the presumptive validity of classifications affecting those groups is eroded, and the particular classification is scrutinized more closely than it otherwise would be.

mental illness is, for the most part, beyond voluntary control." 1 J. ZUSMAN & W. CARNAHAN, MENTAL HEALTH: NEW YORK LAW & PRACTICE 11-9 (1976).[29]

The Secretary's overbroad assumption regarding the inability of mentally disabled persons to contribute to society is itself based on "stereotyped characteristics not truly indicative of their abilities." *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 313 (1976).[30] Mental illness sometimes affects an individual's ability to participate in society, although the relationship is far more attenuated than the Secretary suggests. Assumptions like the Secretary's become self-fulfilling prophecies in that the handicaps of the mentally ill are in significant part attributable to public attitudes of rejection and avoidance. *Public Attitudes, supra*, at 10.

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[29] Moreover, there is an increasing and now substantial body of medical evidence that genetic or biochemical factors play a significant role in causing or creating a predisposition to many types of mental disorders, including schizophrenia and affective disorders (depressions and manias). THE HARVARD GUIDE TO MODERN PSYCHIATRY 81-91, 94-101, 270-71, 301-303 (A. Nicholi ed. 1978); I-II COMPREHENSIVE TEXTBOOK OF PSYCHIATRY 99-101, 162-64, 181-84, 856, 868-72, 882-87, 983-84, 1014-15, 1160-66 (2d ed. A. Freedman, H. Kaplan & B. Sadock eds. 1975); E. SLATER & V. COWIE, THE GENETICS OF MENTAL DISORDERS 11-91 (1971).

[30] Many forms of mental illness have a highly specific impact on their victims, leaving their decisionmaking capacity and reasoning ability largely unimpaired. *Developments—Civil Commitment, supra*, at 1214. *See also id.*, at n.80, 1350 n.146. Mental illness—even when it requires hospitalization—is a concept wholly distinct from incompetence. Public attitudes and laws which automatically equate the two are incorrect. *See* BRAKEL & ROCK, *supra*, at 250-55, 257-58, 264; *Winters v. Miller*, 446 F.2d 65 (2d Cir.), *cert. denied*, 404 U.S. 985 (1971). Moreover, "[t]he enormous disability associated with mental

(Footnote continued on following page)

Finally, the Secretary's reliance on the asserted inability of the mentally disabled to participate equally in society as the basis for denying them any special judicial protection is particularly ironic in this case. The SSI program is specifically intended to mitigate the results of disability, which may prevent the mentally disabled from participating equally. 42 U.S.C. §§ 1381, 1382d (1976 & Supp. II 1978). Measured against this purpose, the Secretary's contention that the mentally ill appellees in this case should receive no special judicial protection precisely because of their disability is simply perverse. This is particularly so since the practical effect of the challenged statutory exclusion may be to prolong or intensify the very disability triggering SSI eligibility.

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[30] *continued*
illness is to a large extent superimposed . . . by the rejection mechanisms stemming from cultural attitudes." ACTION FOR MENTAL HEALTH, *supra*, at 48-49. Disability results or is exacerbated because victims of stigma frequently accept the stigmatized versions of their identities. *See* E. GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY 9 (1963); *Brown v. Board of Educ.*, 347 U.S. 483, 494 (1954).

Some classifications based on mental illness are valid, and when mentally ill people are incompetent the legislature may classify for many purposes on the basis of this criterion. The reference in our Motion to Affirm at 25, to "carefully honed exclusion[s] in some contexts (*e.g.*, voting) . . . " was meant to make this point, and not the one that the Secretary appears to read into it—that general discrimination against or disenfranchisement of all the mentally ill is properly based on improper stereotypes regarding their asserted "inability" to contribute to society. Secretary's Brief at 25. Thus, a state presumably may deny the franchise to those who are mentally ill and incompetent as a result thereof. This does not, however, justify a sweeping, stigma-based disenfranchisement of or other discrimination against all persons identified as mentally ill or disabled. *See* Klein & Grossman, *Voting Competence and Mental Illness*, 127 AM. J. PSYCH. 1562 (1971).

The statutory exclusion of appellees discriminates against a class of persons that has no political power and that is "characterized by some unpopular trait" resulting in a "special likelihood of bias on the part of the ruling majority." *New York City Transit Authority v. Beazer*, 440 U.S. 568, 593 (1979). In such circumstances any discriminatory legislation must be "carefully tuned to alternative considerations," *Trimble v. Gordon*, 430 U.S. 752, 772 (1977), or otherwise substantially related to an important governmental interest. *Wengler v. Druggists Mutual Insurance Co.*, 100 S.Ct. 1540, 1545 (1980). The exclusion of appellees is not.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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No. 79-1380

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In the Supreme Court of the United States

OCTOBER TERM, 1980

PATRICIA R. HARRIS, SECRETARY OF HEALTH AND HUMAN SERVICES, APPELLANT

v.

CHARLES EDWARD WILSON, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

REPLY BRIEF FOR THE APPELLANT

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1. In our opening brief, we argued (at pages 19-23) that Section 1611(e) of the Social Security Act, 42 U.S.C. 1382(e), does not classify recipients of the Supplemental Security Income comfort items allowance on the basis of mental health. Accordingly, we argued that it is unnecessary for the Court to address the question whether a statute that discriminates against the mentally ill must be examined under a heightened, or "middle tier," level of scrutiny. The responses of appellees and amici to this argument are entirely unpersuasive. Indeed, those responses rest upon two fundamental misconceptions of the statutory scheme at issue here.

Appellees assert (Appellees' Br. 16-17, 21) that Section 1611(e)(1) generally permits all residents of public or private medical institutions to receive SSI benefits but

that the statute improperly singles out for exclusion only those individuals who are members of appellees' class, *i.e.*, only those residents of public mental institutions who are between the ages of 21 and 64. The plain language of Section 1611(e)(1), however, demonstrates that the exclusion is not limited to members of appellees' class. Rather, the statute provides for exclusion of all residents of public institutions (including public medical institutions) whose treatment is not funded under the Medicaid program. Thus, as we pointed out in our opening brief (at page 21), appellees are merely one of several groups of otherwise eligible persons who are denied reduced SSI benefits under the statutory exclusion because their treatment is not funded by the federal government under Medicaid. These other groups—and appellees as well—are ineligible for SSI benefits for reasons entirely unrelated to their mental health. The fact that the SSI statutory exclusion is based on the neutral factor of Medicaid eligibility and that numerous other persons who are not mentally ill are excluded together with appellees persuasively demonstrates that the classification is not the result of congressional antipathy toward the mentally ill.[1]

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[1]Appellees attempt to infer congressional antipathy by reference (Appellees' Br. 10-11, 18, 32-34) to the Social Security Act Amendments of 1950, which excluded from medical care benefits any otherwise eligible aged, blind, or disabled person "who has been diagnosed as having tuberculosis or psychosis and is a patient in a medical institution as a result thereof." Ch. 809, Sections 303(a), 343(a) and 351, 64 Stat. 549, 554, 557-558. The validity of that statute, which was repealed when the Medicaid statute was enacted, is not at issue here. As we have shown in our opening brief (at pages 4-5 & n.3, 20-21, 28-29), under the current Medicaid statute numerous categories of mentally ill individuals receive federal assistance in paying for the costs of their treatment. By broadening federal assistance to the mentally ill under Medicaid, and by including the mentally disabled in the SSI program, Congress showed that it was in fact sympathetic to the needs of the mentally ill. See, *e.g.*, 111 Cong.

Appellees' reliance (Appellees' Br. 3, 18) on such cases as *Nyquist* v. *Mauclet*, 432 U.S. 1, 7-9 (1977), and *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164, 169, 172 (1972), is misplaced. In those cases it was argued that the challenged statutes did not classify on the basis of alienage (*Nyquist*) or legitimacy (*Weber*) because some members of those groups were entitled to benefits. The Court rejected this argument in both cases, concluding in *Nyquist* that "[t]he important points are that [the statute] is directed at aliens and that *only aliens are harmed by it*. The fact that the statute is not an absolute bar does not mean that it does not discriminate against the class." 432 U.S. at 9 (emphasis added; footnote omitted). Here, unlike in *Nyquist* or *Weber*, the statutory classification does not exclude only mentally ill individuals; residents of public institutions who are not mentally ill but whose treatment is not funded under Medicaid are also denied reduced SSI payments.

Appellees argue (Appellees' Br. 18) that Section 1611(e)(1) invidiously discriminates against the mentally ill, notwithstanding the fact that appellees and others who are mentally disabled are eligible for SSI benefits precisely because of their mental disabilities. The tautology inherent in the approach urged by appellees is starkly illustrated by the statement in the brief of amici Private Psychiatric Hospital Associations (at pages 7-8, 11) that "[b]ut for their status as mentally ill persons, Appellee class members would be entitled" to reduced SSI benefits. As we have explained in our opening brief (at pages 19, 20 n.13), however, but for their status as mentally ill persons who are disabled by reason of their mental illness, appellees would never have qualified for any SSI benefits. Accordingly, the statute cannot be said to classify invidiously on the basis of mental health.

Rec. 15602 (1965) (remarks of Sen. Long); S. Rep. No. 404, 89th Cong., 1st Sess. 144-147 (1965); S. Rep. No. 92-1230, 92d Cong., 2d Sess. 281 (1972).

2. Appellees assert (Appellees' Br. 32-39) that the statutory exclusion has no rational basis and that Congress did not know what it was doing when it enacted the statute. As to the latter point, we note that amici Private Psychiatric Hospital Associations (Br. 12) agree with our submission that, in creating the classification embodied in Section 1611(e)(1), "Congress was aware of what it was doing, and the legislative history does not demonstrate that the plain language [of the statute] was not intended." *Maine* v. *Thiboutot*, No. 79-838 (June 25, 1980), slip op. 6.

Appellees contend (Appellees' Br. 2, 5, 30) that, in adopting the SSI program, the federal government assumed full responsibility for providing income maintenance to indigent aged, blind and disabled persons, and that exclusion of appellees from eligibility for reduced SSI benefits is inconsistent with that legislative goal. But appellees' citations to the legislative record (Appellees' Br. 14 n.5) refer only to general statements concerning the SSI program; none of the cited remarks makes any reference to Section 1611(e)(1) or to the reduced benefit involved in this case.[2] The mere fact that Congress meant SSI to be a uniform program providing for the subsistence needs of eligible individuals (subject to state supplementation) does not mean that Congress also intended the federal government to assume full responsibility for providing a comfort items allowance to all persons undergoing

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[2]Nothing in the legislative history upon which appellees rely is inconsistent with the Ninth Circuit's statement in *Baur* v. *Mathews*, 578 F. 2d 228, 233 (1978), that the exception in Section 1611(e)(1) was motivated by considerations of economic efficiency and respect for the traditional roles of the states and local governments in caring for certain of their citizens.

treatment at state and locally funded public institutions.[3] If Congress had intended the provision of such an allowance to be a wholly federal responsibility, it would not have incorporated the Medicaid eligibility scheme into Section 1611(e)(1).

Contrary to appellees' assertion (Appellees' Br. 25-27), we do not contend that the same reasons for upholding the exclusion of appellees from Medicaid justify the denial of reduced SSI benefits. Instead, we argue that Congress could properly decide to provide benefits to public institution residents whose treatment the federal government is already funding under Medicaid, while excluding from benefits those public institution residents whose treatment is wholly funded by state and local governments. See *Baur* v. *Mathews*, 578 F. 2d 228, 233 (9th Cir. 1978). Appellees have failed to show why this distinction does not provide a rational basis for the federal statute.[4]

3. Appellees contend (Appellees' Br. 7, 46-47; see also Amici Private Psychiatric Hosp. Ass'n Br. 8, 15, 17-18, 21) that the mentally disabled are entitled to heightened scrutiny and that to deny them such judicial protection because of their inability to contribute to society is to

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[3]We note that at least one state, New York, has assumed responsibility for providing such a personal expense allowance to certain institutionalized individuals. See Brief of Amici State of New York and Commonwealth of Pennsylvania at page 2 n*.

[4]We do not assert that members of appellees' class (or others who are excluded from the reduced SSI benefits) have less of a need to purchase comfort items than other individuals who are not excluded. Rather, we contend that Congress could rationally determine that it was appropriate for state and local governments to provide for the comfort needs of those residents of public institutions whose treatment was entirely funded by state and local government sources. The arguments of amici National Association for Mental Health, *et al.*, are based primarily on considerations of need, and should be addressed to Congress, not the courts.

perpetuate society's stereotyped view of the mentally ill. But the inability of certain mentally ill individuals to contribute to society is the very basis for their inclusion in the SSI program. Here, too, appellees' argument falls of its own weight, since, if appellees were able to "engage in any substantial gainful activity" (42 U.S.C. 1382c(a)(3)(A)), they would not be disabled within the meaning of the statute and would not be eligible for SSI benefits.

For the reasons stated above and in our opening brief, it is respectfully submitted that the judgment of the district court should be reversed.

WADE H. MCCREE, JR.
Solicitor General

NOVEMBER 1980

DOJ-1980-11

No. 79-1380

In The

Supreme Court of the United States

October Term, 1979

PATRICIA R. HARRIS, Secretary of Health and Human Services,

Appellant,

v.

CHARLES EDWARD WILSON, et al.

On Appeal from the United States District Court for the Northern District of Illinois

BRIEF OF THE ATTORNEYS GENERAL OF THE STATE OF NEW YORK AND THE COMMONWEALTH OF PENNSYLVANIA, *AMICI CURIAE,* IN SUPPORT OF THE JUDGMENT APPEALED FROM

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Interest of the State of New York

New York supports the right of its people who reside in public mental institutions to receive Supplemental Security Income for the Aged, Blind and Disabled (SSI) benefits. Specifically involved is their right to receive a monthly $25 SSI benefit paid to otherwise eligible persons residing in a hospital, extended care facility, nursing home or intermediate care facility but denied to them only because they reside in public mental institutions and are between 21 and 65 years of age. The $25 monthly SSI payment is for "small comfort items not supplied by the institution" (House Report No. 92-231 (1971) to accompany HR-1 of

1971, reprinted at 1972 US Code Cong. and Admin. News, p 4989 at p 5136). We argue for the proposition that there is no basis, in terms of people and their comfort, for treating patients residing in public mental institutions, who are federally disqualified from receiving such SSI benefit, differently from patients residing in other health care facilities, who do receive it.*

ARGUMENT

The classification here in issue is not only imprecise, it is wholly without any rational basis; there is no rationality in the nature of the class singled out.

The Court below held that "Congress could well conclude that public institution inmates are receiving all of the funds to which they are entitled" (Jur. St. 8a), citing *Dandridge v Williams*, 397 US 471 (1970). That case, however, did not "suspend the operation of the Equal Protection Clause in the field of social welfare law" (*Hagans v Lavine*, 415 US 528, 539 [1974]; see also *United States Dept. of Agriculture v Moreno*, 413 US 528 [1973]) and the classification must have a reasonable basis (*Graham v Richardson*, 403 US 365, 371 [1971]). These plaintiffs are deserving of this Court's special consideration for the reasons stated by the District Court.

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*New York, in recognition of the importance of the personal expense allowance, has, by statute, provided for such an allowance out of their SSI benefits to SSI beneficiaries who receive family care, residential care or care in a residential facility for the mentally retarded and whose SSI benefits would otherwise be used *in toto* to pay for such care (New York Social Services Law § 131-o; *Kupferman v Bd. of Social Welfare*, 66 New York AD2d 540 [3d Dept, 1979], affd 49 NY2d 742 [1980]). The allowance is "for his own use in obtaining clothing, personal hygiene items, and other supplies and services for his personal use not otherwise provided * * *" (§ 131-o[2]) and is deducted from the additional State payment component of the SSI grant (§ 131-o[1]).

A. *The Character of the Classification in Question**

Not all inmates of all public institutions receive the $25 stipend for small comfort items afforded by section 1611(e)(1)(B) of the Act (42 USC § 1382[e][1][B]). Those residing in public mental institutions do not receive it. No rational basis for their exclusion has been demonstrated.

The salutary purpose of the SSI program is "to provide supplemental security income to individuals who have attained age 65 or are blind or disabled" (§ 1601 of the Act, 42 USC § 1381). Since residents of public medical institutions (who receive the $25 stipend) and residents of public mental institutions (who do not receive it) are all disabled, they perforce would all qualify for the general SSI benefit were it not for exclusionary provisions.

We have in an appendix hereto traced the statutory history of those exclusionary provisions as to both cash assistance and medical assistance programs. It has been demonstrated that such exclusionary provisions, while now stated in Medicaid terms, are generally the same as have been in effect for the last thirty years as to both cash and medical assistance programs.** Those years

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*See *Dunn v Blumstein*, 405 US 330, 335 (1972):

> "To decide whether a law violates the Equal Protection Clause, we look, in essence, to three things: the character of the classification in question; the individual interests affected by the classification; and the governmental interests asserted in support of the classification."

**This is a cash assistance case and should be decided as such. There is neither need nor warrant to "examine the validity of the medicaid [exclusionary] scheme" as the Secretary suggests (Br, p 28). In any event its validity should not be determined in an action to which not a single state officer is a party (see *Legion v Richardson*, 354 F Supp 456 [SDNY, 1973], affd sub nom. *Legion v Weinberger*, 414 US 1058 [1973]). Extremely important and significant aspects of Medicaid "cooperative federalism" (*Harris v McRae*, ___ US ___, 100 S Ct 2671, 2683 [1980]) are involved which should not be decided upon the record now before the Court (cf. *Mt. Healthy City School District Bd. of Educ. v Doyle*, 429 US 274, 278 [1977]). This Court only recently has alluded to the Medicaid exclusion in a Medicaid context (*Harris v McRae, supra*, 100 S Ct at 2692, n 28); see also Mr. Justice STEVENS dissenting, 100 S Ct at 2715).

have seen the exlusion narrowed from all inmates of public medical institutions to those "living in public medical institutions . . . for mental diseases and tuberculosis" (Appendix p A-1). And the class, as to those living in public mental institutions has been further narrowed by conferring eligibility upon those 65 years of age and older and those under 21 years of age.

Congress has legislated in terms of "small comfort items" for persons living only in some public institutions but not in others. We urge that the statute has a substantial disparate impact upon those between 21 and 65 years of age residing in public mental institutions (*Califano v Boles*, 443 US 282, 294 [1979]). The classification here involved is unreasonable and arbitrary. It does not "rest upon some ground having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced are treated alike" (*Johnson v Robison*, 415 US 361, 374 [1974]). The distinction in terms of small comfort items has no basis in practical experience (*McGinnis v Royster*, 410 US 263, 276 [1973]).

B. *The Individual Interests Affected by the Classification*

The New York experience demonstrates that those confined in public mental institutions could enjoy the comforts that the stipend would provide.

It is estimated that there are approximately 12,200 persons between the ages of 21 and 65 years of age who now reside in State mental health facilities. The length of stay of approximately 9,000 of their number is in excess of six months. The remainder is a turnover population whose average length of stay is approximately 24 days. Of the 9,000, it is estimated that 85 percent, or approximately 7,700 persons, would be eligible for SSI. Of the turnover population of approximately 3,000 persons, it is estimated that approximately 40% or 1,200 people would be eligible for SSI. Since, however, they happen to live in a public mental institution, they are ineligible to receive the SSI benefit.

Implicit in the congressional determination to deny the $25 monthly SSI stipend to residents of public mental institutions, is the assumption, totally unwarranted, that such persons do not need or cannot utilize the comfort items which residents of hospitals, extended care facilities, nursing home or intermediate care facilities are able to purchase with their $25 monthly stipend.*

Level of care surveys conducted by State Office of Mental Health staff indicate that patients receiving care at New York psychiatric centers (the name given to some State mental health institutions) are, to a great extent, ambulatory and fully capable of carrying out normal activities of daily living.**

Most patients have grounds privileges and are not confined to locked or closed wards. They are able to visit the facility's community store and purchase incidentals, snacks, personal care items, cigarettes or personal clothing items (items not provided by the state) that the patient may need to maintain his or her interest in life, to maintain personal appearance or to allow him or her to socialize with other patients.

Day passes for visits to shopping centers, stores or community recreational activities, usually in the company of a relative or a staff member, are also issued to patients.

State facilities have procedures and policies to safeguard and "bank" the private funds of the patients and to issue the patients money for the purchase of the type of items described above. A patient can draw on his or her account at will to make such personal purchases. It is a common practice for a patient's family to deposit moneys in such accounts during family visits, and for patients employed at the facility to have the cash

*If they are not senile or otherwise incapacitated.

**It is estimated that between 30% and 35% of persons living in such centers would be able to be cared for in adult residential facilities – rather than in a hospital setting – if such facilities had the available additional bed capacity.

compensation they earn deposited in their cash account. Income from other sources, such as pensions, social security or veterans' benefits, is also deposited in these accounts. Patients are encouraged and assisted in the proper handling of their own funds as part of the therapeutic process, an aim expressly recognized in the department's policy manual (State of New York, Department of Mental Hygiene, Department Policy Manual § 2730[A], "Patients Encouraged to Self-Determination").*

Persons who reside in state psychiatric centers are generally allowed to smoke, can read a magazine and have a piece of candy. Canteen trucks and ice cream trucks are generally permitted to come on state campuses. Residents of state psychiatric centers can enjoy all of these comfort items, to a greater or lesser degree, as much as any person who receives the stipend. But they are excluded simply because they reside in institutions for mental diseases and are between 21 and 65 years of age.

C. *The Exclusion Does Not Further a Legitimate Governmental Interest*

"Comfort" has been said to be synonymous with "amusement", "pleasure" and "happiness" (*Industrial Trust Co. v Commissioner of Internal Revenue*, 151 F2d 592, 594 [1st Cir, 1945], cert den 327 US 788 [1945]). It has been defined as a state of tranquil or moderate enjoyment resulting from satisfaction of bodily wants and freedom from care or anxiety; a feeling or state of well-being, satisfaction or contentment (*Equitable Trust Co. v Montgomery*, 28 Del Ch 389, 44 A2d 420, 423 [1945]). The term is not limited soley to necessaries of life but "may include things which bring ease, contentment and enjoyment" and is "something more than support, a minimum endurable standard of living" (*Strite v McGinnes*, 330 F2d 234, 239 [3d Cir, 1964], cert

*It is estimated that approximately one-third of the patients cannot handle money. Departmental personnel can, however, make their purchases for them.

den 379 US 836 [1964], citing Pennsylvania precedent; see, also *Blodget v Delaney*, 201 F2d 589, 593 [1st Cir, 1953]). There is simply no basis for discriminating between residents of public medical institutions and residents of public mental institutions in terms of furnishing a stipend to purchase "small comfort items."

It is no answer to say, as the Secretary does, that the denial of benefits "is rationally related to the legitimate legislative desire to avoid spending federal resources on behalf of individuals whose care and treatment are being fully provided for by state and local government units." (Br, p 27.) The Secretary has used "care and treatment" in a Medicaid context (see § 1905 of the Act, 42 USC § 1396d). The stipend has nothing to do with medical care and treatment. It is for "small comfort items not supplied by the institution" and is not intended for, nor may it be used to supply medical needs. A denial of these SSI benefits is not a denial of funds to a Medicaid facility; it is a denial of needed items to the disabled.

Having identified the need and generally provided for it, Congress cannot deny it to some individuals on the wholly irrational grounds of age (because they happen to be between 21 and 65) or the source of payment of their medical needs. "[T]he classification here in issue is not only 'imprecise' it is wholly without any rational basis." *United States Department of Agriculture v Moreno, supra*, 413 US at 538. There is no "rationality in the nature of the class singled out". *Rinaldi v Yeager*, 384 US 305, 308, 309 (1966).

CONCLUSION

The Judgment of the District Court should be affirmed.

Dated: Albany, New York
October 6, 1980

Respectfully submitted,

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APPENDIX

APPENDIX
Statutory History of the SSI Exclusionary Provisions (§ 1611[e][1] of the Social Security Act, 42 USC § 1382[e][1])

In addition to the Aid to Families with Dependent Children program (AFDC, 42 USC §§ 601, *et seq.*) the Social Security Act, from its inception, contained assistance programs of Old Age Assistance (Title I, 42 USC §§ 301, *et seq.*) and of Aid to the Blind (Title X, 42 USC §§ 1201, *et seq.*). The term old age assistance as enacted in 1935 was defined to mean "money payments to aged individuals" (Social Security Act § 6, 74 Stat 622). Section 3(a) of that title provided for payment to states of federal assistance with respect to each individual who at the time of such expenditure was 65 years of age or older "and is not an inmate of a public institution" (74 Stat 621). So, too, Aid to the Blind was defined as meaning "money payments to blind individuals" (Social Security Act § 1006, 74 Stat 647) and section 1003 of the Act, as to payment to states, did not provide any federal payments for individuals who were inmates of a public institution (74 Stat 646). These provisions remained on the statute books, with only minor changes (53 Stat 1361, 1362, 1397, 1398) until 1950.

The report of the Committee on Finance of the United States Senate, No. 1669, to accompany H.R. 6000, dated May 17, 1950, reprinted at 1950 US Code Congressional Service, p 3287, stated (p 3347):

> "Under existing law, the Federal Government participates in the cost of assistance payments to aged and blind individuals residing in private but not in public institutions. Under the committee-approved bill, the Federal Government would share in the cost of payments to old-age assistance and aid to the blind recipients living in public medical institutions other than those for mental diseases and tuberculosis."

APPENDIX

Statutory History of the SSI Exclusionary Provisions (§ 1611[e][1] of the Social Security Act, 42 USC § 1382[e][1])

Thus it was that, as to Old Age Assistance, the prohibition against payment for individuals who were inmates of public institutions was transferred from the payment provisions of that title (Social Security Act § 3, 64 Stat 549) to the "definition" provision of the title (Social Security Act § 6, 64 Stat 549).*

The payment provisions of the Aid to the Blind program were changed in a like manner (64 Stat 553) as was the definition of the term "aid to the blind" (§ 1000 of the Social Security Act, 64 Stat 554). A fourth program of assistance, was added to the Act to provide aid to the permanently and totally disabled (Title XIV, Social Security Act, §§ 1401, *et seq.*, 64 Stat 555). The payment provisions thereof (*id.* § 1403, 64 Stat 556) and the definitional provisions thereof (*id.* § 1405, 64 Stat 557) tracked the Old Age Assistance provision.

For the first time Federal law provided for two kinds of asistance to the aged, the blind and the disabled. The first type was money (cash) payments "to" an individual. The second was payment for remedial care made "in behalf of" such an individual.

Such distinction, made manifest in 1950, was underscored in 1960 by the addition of the Medical Assistance for the Aged (MAA) program to afford certain care and services for in-

*"Sec. 6. For the purpose of this title, the term 'old-age assistance' means money payments to, or medical care in behalf of or any type of remedial care recognized under State law in behalf of, needy individuals who are sixty-five years of age or older, but does not include any such payments to or care in behalf of any individual who is an inmate of a public institution (except as a patient in a medical institution) or any individual (a) who is a patient in an institution for tuberculosis or mental diseases, or (b) who has been diagnosed as having tuberculosis or psychosis and is a patient in a medical institution as a result thereof."

APPENDIX
Statutory History of the SSI Exclusionary Provisions
(§ 1611[e][1] of the Social Security Act,
42 USC § 1382[e][1])

dividuals sixty-five years of age or older who were not recipients of old-age assistance (74 Stat 99). The trust of the 1950 provision, with amendments, was carried forward as to those receiving cash or care under the Old-Age Assistance Program (§ 6[a] of the Social Security Act) and inserted in the medical assistance provisions (*id.*, § 6[b], 74 Stat 991).

In 1962 Congress enacted a combined program of assistance whereby the states were given the option of combining their programs of Old Age Assistance (Title I), aid to the blind (Title X), and to the disabled (Title XIV) in a new program designated as Title XVI. The definitional terms of that program followed those of Titles I, X and XIV without major substantive change (76 Stat 204, 205, 207).

It was in 1965 that the Medicaid provisions were inserted in the Social Security Act (Public Law 89-97). Section 1905 (42 USC § 1396d) provided, *inter alia*, for payment of the cost of:

> "(15) any other medical care, and any other type of remedial care recognized under State law, specified by the Secretary; except that such term does not include—
>
> "(A) any such payments with respect to care or services for any individual who is an inmate of a public institution (except as a patient in a medical institution); or
>
> "(B) any such payments with respect to care or services for any individual who has not attained 65 years of age and who is a patient in an institution for tuberculosis or mental diseases." (79 Stat 352)*

*Subdivision 15 was renumbered 17 and subdivision 16 was inserted (as to those under 21) by Public Law 92-603, § 299B, 86 Stat 1460.

APPENDIX
Statutory History of the SSI Exclusionary Provisions (§ 1611(e)(1) of the Social Security Act, 42 USC § 1382(e)(1))

The definitional terms of the cash assistance programs, other than those for old age assistance and for the combined program, were amended to follow the Medicaid definition (§ 1006, Aid to the Blind and § 1405, Aid to the Disabled; 79 Stat 358). The Old Age Assistance program and the combined program followed the Medicaid definition, taking into account, however, the care henceforth to be furnished to those over 65 (§ 6, 79 Stat 356, Old Age Assistance, § 1605, Aid to the Aged, Blind and Disabled, 79 Stat 358).

It was in 1974 (Public Law 92-603; 86 Stat 1329) that Titles I, X, XIV (and thus XVI as well) programs were, as to the 50 states (*id.* § 303, 86 Stat 1484) *, repealed and replaced by the new program of Supplemental Security for the Aged, Blind and Disabled, to be effective January 1, 1974, and also designated as Title XVI of the Social Security Act.

The disqualification of inmates of a public institution from receiving cash assistance is continued as to SSI recipients at section 1611(e)(1)(A) of the Social Security Act, 86 Stat 1467 (42 USC § 1382[e][1][A]), but the phrase "(except as a patient in a medical institution)" does not occur.

The disqualification of patients in a public institution for tuberculosis or mental diseases from receiving cash assistance (the $25 monthly stipend) is continued at section 1611(e)(1)(B), 86 Stat 1467 (42 USC § 1382[e][1][B]) because the Medicaid exclusions have been changed.

---

*Section 303 provided that the new SSI provisions were not applicable in the case of Puerto Rico, Guam and the Virgin Islands and that the repeal of Titles I, X and XIV was not applicable as to them. Thus the programs and their definitional terms remain on the statute books to this day.

No. 79-1380

MICHAEL ROD

IN THE

Supreme Court of the United States

October Term, 1980

PATRICIA R. HARRIS,
Secretary of Health and Human Services,
Appellant,

v.

CHARLES EDWARD WILSON, et al.,
Appellees.

On Appeal From the United States District Court for the Northern District of Illinois

BRIEF OF AMICUS CURIAE THE NATIONAL ASSOCIATION FOR MENTAL HEALTH THE AMERICAN PSYCHIATRIC ASSOCIATION THE AMERICAN ORTHOPSYCHIATRIC ASSOCIATION

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No. 79-1380

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

PATRICIA R. HARRIS
Secretary of Health and Human Services,
Appellant,

v.

CHARLES EDWARD WILSON, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF OF AMICUS CURIAE

INTEREST OF THE AMICI CURIAE

The Amici Curiae are three national organizations with a direct interest in the welfare of the institutionalized mentally disabled. The National Association for Mental Health is a voluntary citizens' organization with approximately one million members, whose purposes include working for the promotion of mental health and the improvement of services for the mentally impaired. The American Orthopsychiatric Association is an interdisciplinary association of psychiatrists, psychologists, social workers, educators, and allied health professionals whose four thousand members are concerned with the problems of those who suffer from mental disorder. The American Psychiatric Association is a membership organization of over twenty-five thousand psychiatrists, many of whom treat and care for the indigent publicly institutionalized mental patients in our nation. Each of these associations is concerned with the promotion of individual dignity and the rehabilitation of the publicly institutionalized mental patient.

Amici file this brief pursuant to consents of the parties which have been filed with the Clerk of Court.

SUMMARY OF ARGUMENT

This class action deals with the total exclusion of certain publicly institutionalized mental patients from need-based Supplemental Security Income benefits (hereinafter "SSI") under Section 1611(e)(1)(B) of the Social Security Act, 42 U. S. C. § 1382(e)(1)(B). The question before this Court on appeal is whether the statutory exclusion from benefits under 42 U. S. C. § 1382(e)(1)(B) violates the Due Process Clause of the Fifth Amendment to the United States Constitution.

In this Amicus Brief, the National Association for Mental Health, the American Orthopsychiatric Association, and the American Psychiatric Association will deal with the vitally important nature of the benefits in question to the institutionalized indigent individuals affected. Amici here assert that the statutory classification in 42 U. S. C. § 1382(e)(1)(B) violates the Due Process Clause of the Fifth Amendment to the United States Constitution in that the statute fails to meet scrutiny under traditional rational basis standards.

ARGUMENT

I. The Personal Need Allowance in 42 U. S. C. § 1382 (e)(1)(B) Is Vitally Necessary to Indigent Institutionalized Residents' Dignified Subsistence and Rehabilitation

A. A Personal Need Allowance Is Necessary to a Humane and Dignified Subsistence Within the Institution.

Historically, the movement for special institutions for the insane began in the first quarter of the nineteenth century. A. DEUTSCH, THE MENTALLY ILL IN AMERICA: A HISTORY OF THEIR CARE AND TREATMENT FROM COLONIAL TIMES 112 (1967). That movement was followed in the second quarter of the nineteenth century by the rise of the state institution. *Id.* at 133.[1] Though the modern trend has been toward the reintegration of the mentally ill into the community, *see, e.g.*, Greenblatt and Glazer, *The Phasing Out of Mental Hospitals in the United States*, 132 AM. J. PSYCHIATRY 1135 (1975); Community Mental Health Centers Act, 77 Stat. 290, *as amended*, 42 U. S. C. §§ 2689 *et seq.* (Supp.), of the 600,000 mentally ill individuals who receive active treatment in this country each year, nearly 200,000 remain hospitalized in public institutions.[2] 1 FINAL REPORT TO THE PRESIDENT FROM THE

1. By that time old notions concerning the mentally ill as incurable had been discarded and reformers such as Dorothea Dix lobbied for a rebuilding of our system of care for the disabled mentally ill. DEUTSCH, *supra* at 112; S. BRAKEL and R. ROCK. THE MENTALLY DISABLED AND THE LAW 8 (1971).

2. It is estimated that two million Americans have been or would be diagnosed as mentally ill in this country. Of those only 600,000 receive active treatment in any one year. 1 THE PRESIDENT'S COMMISSION ON MENTAL HEALTH, *supra* at 8.

JOINT COMMISSION ON MENTAL HEALTH 4 (1978) [hereinafter "THE PRESIDENT'S COMMISSION ON MENTAL HEALTH"]; U. S. DEPARTMENT OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 108 (1978).

Since the middle of the twentieth century sociologists, psychiatrists, and psychologists have recognized that confinement in a public institution for treatment can have adverse consequences for the mentally ill individual both with regard to dehumanization while hospitalized and the loss of skills necessary for discharge into the community. E. BLEULER, DEMENTIA PRAECOX OR THE GROUP OF SCHIZOPHRENIAS 374-5 (Joseph Zinkin transl. 1950), *cited in* A. FAIRWEATHER, D. SANDERS, H. MAYNARD, and D. CRESSLER, COMMUNITY LIFE FOR THE MENTALLY ILL: AN ALTERNATIVE TO INSTITUTIONAL CARE 11 (1969) [hereinafter "FAIRWEATHER"]; E. GOFFMAN, ASYLUMS: ESSAYS ON THE SOCIAL SITUATION OF MENTAL PATIENTS AND OTHER INMATES (1961). Our government and courts have more recently acknowledged the same. FINAL REPORT OF THE JOINT COMMISSION ON MENTAL ILLNESS AND HEALTH, ACTION FOR MENTAL HEALTH 270 (1961); 42 U. S. C. §§ 2689 *et seq.* (Supp.); *see also Vitek v. Jones*, — U. S. —,100 S. Ct. 1254, 1263 (1980), *citing Addington v. Texas*, 441 U. S. 418, 425-426 (1979).[3]

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3. Conditions at state institutions have often been recognized as being woefully inadequate. BRAKEL and ROCK, *supra* note 1 at 8; A. DEUTSCH, THE SHAME OF THE STATES (1948); Solomon, *The American Psychiatric Association in Relation to American Psychiatry*, 115 AM. J. OF PSYCHIATRY 7 (1958). Several lower courts have reviewed conditions at state institutions and have found them to be constitutionally impermissible. *See, e.g., Wyatt v. Stickney*, 344 F. Supp. 387 (M. D. Ala. 1972) *aff'd in part, rem'ded in part and decision rev'd in part sub nom. Wyatt v. Aderholt*, 503 F. 2d 1305 (5th Cir. 1974); *Davis v. Watkins*, 384 F. Supp. 1196 (N. D. Ohio 1974).

Because confinement to a total institution is attendant with severe deprivations for the mentally ill resident, *see, e.g.,* GOFFMAN, *supra,* the exclusion from a personal need allowance can be even more dehumanizing to the mental patient than poverty in a slum. *See* Wolfensberger, *The Principle of Normalization and Its Implications for Psychiatric Services,* AM. J. PSYCHIATRY 3 (1970) [hereinafter "Wolfensberger, *Implications for Psychiatric Services*"], citing Bartlett, *Present Day Requirements for State Hospitals Joining the Community,* NEW ENG. J. MED. 276 (1967); *see* F. DOSTOEVSKI, MEMOIRS FROM THE HOUSE OF THE DEAD 16 (1956).

Erving Goffman first described the severe deprivations attendant to confinement to the total institution in his discourse on asylums. *See* GOFFMAN, *supra* at 18-20, 41, 43, 44. He describes the property dispossession and loss of normal adult autonomy and control which occurs, and how, through a stripping of the individual's self, the individual is dehumanized by the institutional environment. *Id.; see* D. VAIL, DEHUMANIZATION AND THE INSTITUTIONAL CAREER (1966).

As Goffman and others have explained, because the possession of property is invested with feelings of self, the ownership of a few items of property becomes vitally important to retaining one's self-identity while hospitalized and to preventing the stripping process from occurring. *Id.* at 18-20; M. GREENBLATT, R. YORK & E. BROWN, FROM CUSTODIAL TO THERAPEUTIC PATIENT CARE IN MENTAL HOSPITALS: EXPLORATIONS IN SOCIAL TREATMENT 86 (1955). Williams, *Money and the Therapeutic Process,* 18 CANADA'S MENTAL HEALTH 21 (1970).

Confinement to an institution also deprives the individual of normal adult control over what are minor activities. GOFFMAN, *supra* at 18, 41, 43-44. Because confinement so greatly removes the patient's control over his

environment, the ability to make a telephone call, have a snack, or smoke a cigarette, achieves a special greater significance for the confined mentally ill individual. GOFFMAN, *supra* at 51, 257; *Koe v. Califano*, 573 F. 2d 761, 763 n. 5 (2d Cir. 1978); *see* DOSTOEVSKI, *supra* at 16. It is in fact quite common to see patients begging for cigarettes, coffee or snacks when funds are unavailable to them. GOFFMAN, *supra* at 296.

Small sums of money also serve the more basic function of providing the indigent patient with the hygiene items, toiletries, snacks, coffee, cigarettes, and clothing which are necessary to a minimally dignified level of subsistence within the institution. While "[t]he hospital provides food and shelter . . . it is only the SSI payments that make possible the purchase of personal items essential to any human existence transcending bare subsistence." *Koe v. Califano*, 573 F. 2d at 763 n. 5; *see* The House Report to the SSI program from the Committee on Ways and Means, H. REP. No. 231, 92d Cong., 2d Sess. 150 (1971), *reprinted in* [1972] U. S. CODE CONG. & ADM. NEWS 5136 [hereinafter "1972 U. S. CODE CONG. & ADM. NEWS"]. The absence of funds with which to purchase such personal comfort items imposes a "readily understandable burden," *Koe v. Califano*, 573 F. 2d at 763 n. 5, upon the indigent institutionalized patient who has no other source of money. *See* GOFFMAN, *supra* at 18-20, 41-51.

By enhancing the confined patient's status and self-esteem, *see* Williams, *supra* at 21; W. WOLFENSBERGER, THE PRINCIPLE OF NORMALIZATION IN HUMAN SERVICES 87 (1972) [hereinafter "WOLFENSBERGER, NORMALIZATION IN HUMAN SERVICES"], by enabling the patient to exert normal adult control over his life, *see, e.g.*, GOFFMAN, *supra* at 270, Williams, *supra* at 21, and by supplying the patient with comfort items necessary to dignified living, *see* GOFFMAN, *supra* at 20, 44, 296, *Koe v. Califano*, 573 F. 2d

at 763 n. 5, small sums make living in the confined institutional environment eminently more tolerable. GOFFMAN, *supra* at 265-266 n. 127.

B. A Personal Need Allowance Promotes the Rehabilitation and Discharge of the Institutional Patient.

One of the other negative consequences of being confined to an institution is the process of "institutionalization," *i.e.*, the desocialization process by which confined individuals lose their ability to function in the outside community. *See* GOFFMAN, *supra* at 13; GREENBLATT, YORK & BROWN, *supra* at 363. Many writers have discussed the "institutionalization" process and its negative impact on the individual's discharge and release to the community. Bleuler, writing in Germany in 1950, first alluded to the dangers that institutions placed to later discharge when he wrote:

> The institution . . . carries with it the danger that the patient may become too estranged from normal life, . . . it is often extremely difficult to place even a greatly improved patient outside the institution, after he has been hospitalized for a number of years.

FAIRWEATHER, *supra* at 11. Erving Goffman later analyzed the institution in terms of the barriers it placed upon the patient's departure, *see* WOLFENSBERGER, THE PRINCIPLE OF NORMALIZATION IN HUMAN SERVICES, *supra* at 80, and labeled the process as one of "disculturation" wherein the confined individual loses his ability to manage certain features of daily living on the outside if and when released. GOFFMAN, *supra* at 13. Since then, commentators have assigned medical labels such as "institutional neurosis" and "social breakdown syndrome" to the withdrawal and regression that are clinical signs of the institutionalization process. Brandon and Gruenberg, *Measurement of the*

Incidence of Chronic Severe Social Breakdown Syndrome in EVALUATING THE EFFECTIVENESS OF COMMUNITY MENTAL HEALTH SERVICES 132 (E. Gruenberg ed. 1965). *See generally* Zusman, *Some Explanations of the Changing Appearance of Psychiatric Patients—Antecedents of the Social Breakdown Concept,* in EVALUATING THE EFFECTIVENESS OF COMMUNITY MENTAL HEALTH SERVICES 363 (E. Gruenberg ed. 1963). Whatever the attached label, it is now clear that confinement to a total institution can result in the patient's progressive desocialization, the impact of which is to block that patient's discharge and release into the community.

In recognition of the dangers of institutionalization, modern emphasis has been placed upon "normalization" of the institutional environment as a means of preventing the desocialization process. WOLFENSBERGER, NORMALIZATION IN HUMAN SERVICES, *supra* at 153 (1972).[4] *See* FINAL REPORT OF THE JOINT COMMISSION ON MENTAL ILLNESS AND HEALTH, *supra* at 270. The principle of normalization maintains that any feature of a residential service that is normalizing will increase the likelihood that the individual will return to his family, move to an advanced form of residence or be fully habilitated. WOLFENSBERGER, NORMALIZATION IN HUMAN SERVICES, *supra* at 92.

It is now clear that small sums of actual money also play a vital role in the "normalization" process and its attendant rehabilitation of the mental patient for discharge

4. The principle of normalization states that human management practices should enable a deviant person to function in as normal a manner as possible. Wolfensberger, *Implications for Psychiatric Services, supra* at 3. This principle has been largely adopted by the psychiatric community. *See, e.g.,* FINAL REPORT OF THE JOINT COMMISSION ON MENTAL ILLNESS AND HEALTH, *supra* at 270.

into the community. Williams, *supra* at 21 (1970); WOLFENSBERGER, NORMALIZATION IN HUMAN SERVICES, *supra* at 87; *see* GOFFMAN, *supra* at 18. Because small sums of money, (as opposed to credit or scrip), enhance normal attitudes of security, status and self-esteem in the patient, and enable the patient to exert adult control over the world both inside and outside the hospital, the desocialization process is in large measure blocked. Williams, *supra* at 21; WOLFENSBERGER, NORMALIZATION IN HUMAN SERVICES, *supra* at 87; GOFFMAN, *supra* at 18.

The studies, which have focused attention upon the impact of money on "normalizing" the environment and preventing desocialization, further corroborate the "normalizing" and rehabilitative impact of small sums of money. *See* GREENBLATT, YORK & BROWN, *supra*.[5] They establish the link between ownership and possession of one's own property and ultimate discharge and release to the community. Morgan and Cushing, *The Personal Possessions of Long-Stay Residents in Mental Hospitals*, 1 SOCIAL PSYCHIATRY 151 (1966).[6]

Some commentators have also reported that small sums of money have acted as the unlocking device for certain regressed patients who were otherwise inaccessible to more traditional therapeutic approaches.

5. This study done on chronic patients in Massachusetts demonstrated how the ownership of personal possessions (therein one's own set of clothing) and the availability of small amounts of money for patients had a positive impact on remotivating and resocializing chronic patients for release and discharge into the community. *See* GREENBLATT, YORK & BROWN, *supra* at 87. It concluded that this type of rehabilitation program was successful in resocializing even the most chronic patients. *Id.* at 427.

6. This British study of chronic patients at St. Wullstam's Hospital evidenced the correlation between personally owned property and patient progress toward discharge. Morgan and Cushing, *supra* at 156.

GREENBLATT, YORK & BROWN, *supra* at 331-2; *see* Williams, *supra* at 23. As the Greenblatt study reported, regressed patients who had not been known to speak for years requested change for a quarter when given a weekly allotment of money rather than coupons with which to purchase snack and hygiene items. GREENBLATT, YORK & BROWN, *supra* at 331. *See also* GOFFMAN, *supra* at 257.

Psychiatrists, psychologists, social workers and other professionals in the field have acknowledged and recommended that:

> As much as possible clients should be provided with ownership, not only of their own possessions, but also of their life space in the residence. . . . the resident generally should have, . . . money (not scrip or credit!) . . . [C]lients who are impecunious [should be] provided . . . allowances . . . so as to increase dignity, assist in realistic social training and foster independent choice behavior.

WOLFENSBERGER, NORMALIZATION IN HUMAN SERVICES, *supra* at 87.

For chronic patients who have already suffered the desocializing effects of institutional living, small sums of money are no less important to their rehabilitation, and release. *See* GREENBLATT, YORK & BROWN, *supra* at 427. With recent governmental emphasis on the reintegration of chronic patients to the community, *see* 1 THE PRESIDENT'S COMMISSION ON MENTAL HEALTH, *supra* at 1, 22, more and more institutions are now involved in resocialization programs aimed toward the successful discharge of chronic patients to the community. Waldeck, Emerson and Edelstein, *Cope: A Systematic Approach to Moving Chronic Patients Into the Community,* 30 HOSP. & COMM. PSYCHIATRY 551 (1979); *see also* Lamb, *An Educational*

Model for Teaching Living Skills to Long-Term Patients, 27 HOSP. & COMM. PSYCHIATRY 875 (1976). Central to these programs' success is re-teaching patients how to use, manage, and budget their own money in a responsible adult fashion, and to handle the essentials of grooming and personal hygiene. Waldeck, Emerson and Edelstein, *supra; Lamb, supra.*

As the chief of one such rehabilitation service in the community has explained:

> Much of [the] . . . difficulty in adjusting to the community has to do with not knowing such things as the essentials of managing their money; how to use banking services; how to use the resources available to them in the community; . . . the essentials of grooming, personal hygiene. . . . For many patients knowledge and skills in these areas make the difference between being able to live independently in the community and living in a hospital or existing at a very low level in a residential care home.

Lamb, *supra* at 875. *See also* Waldeck, Emerson and Edelstein, *supra* at 552-553. Quite clearly, chronic patients without funds cannot fully benefit from the rehabilitation programs intended to prepare them for community living.

To summarize, one can only conclude that small sums of money are vitally important 1) to a minimally dignified level of subsistence in the institution, 2) to the prevention of the desocialization process, and 3) to the rehabilitation and discharge of the chronically ill patient.

II. The Statutory Exclusion of Certain Persons From Need Benefits Under 42 U. S. C. § 1382(e)(1)(B) Violates the Due Process Clause Under Traditional Rational Basis Scrutiny

A. The Exclusion From Need Benefits Under 42 U. S. C. § 1382(e)(1)(B) Is Both Unexplained and Ambiguous.

Though our country's public institutions do provide their indigents with food and shelter, they are not responsible for and typically fail to provide them with the personal comfort items necessary to a dignified level of subsistence in the institution, *Koe v. Califano,* 573 F. 2d at 763 n. 5 (2d Cir. 1978); 1972 U. S. CODE CONG. & ADM. NEWS *supra* at 5136, and for the rehabilitation of patients for release to the community. GREENBLATT, YORK & BROWN, *supra* at 85, 245 (1955).[7]

In 1972, when Congress enacted the federal SSI program it recognized the unmet need of the publicly institutionalized indigent mental patient and determined that the SSI program would meet the need for small comfort items by providing a $25 per month personal need allowance for all patients in "*institutions . . . which* [we]re getting Medicaid funds," 1972 U. S. CODE CONG. & ADM. NEWS, *supra* at 5136 (emphasis added), *i.e.,* Medicaid

7. We note the difference between the traditional responsibilities of the State with regard to medical care in psychiatric institutions, and with regard to providing comfort items or personal need allowances. While the State has traditionally been responsible for providing psychiatric care in state institutions, *see* S. Rep. No. 404, 89th Cong. 1st Sess. (1965) *reprinted in* [1965] U. S. CODE CONG. & ADM. NEWS, *supra* at 2084, *Legion v. Richardson,* 354 F. Supp. 456, 459 (1973) *aff'd sub nom. Legion v. Weinberger,* 414 U. S. 1058 (1973), it has not been responsible for and has traditionally failed to provide personal comfort items. 1972 U. S. CODE CONG. & ADM. NEWS, *supra* at 5136; *Koe v. Califano, supra* at 763 n. 5.

certified facilities.[8] Though the stated intention of Congress in enacting 42 U. S. C. § 1382(e)(1)(B) was to provide a $25 per month personal need allowance to all persons in certain medical "*institutions . . . which* [we]re getting Medicaid funds," it was not the Congressionally enacted result. Instead, the statutory language of 42 U. S. C. § 1382(e)(1)(B) provides for a $25 per month SSI personal need allowance when the *individual* is receiving Medicaid payments on behalf of his or her individual psychiatric care. 42 U. S. C. § 1382(e)(1)(B). By tying eligibility for the SSI personal need allowance to the *individual's* eligibility for Medicaid, rather than the *institution's,* indigent publicly institutionalized patients aged 21 through 64, who are in Medicaid certified institutions, are excluded from receiving benefits under the statute. The legislative history of the SSI statute demonstrates no reason for the difference found in the statutory language. The language "(with respect to such individual or spouse)" 42 U. S. C. § 1382(e)(1)(B), which ties eligibility for SSI to the *individual's* receipt of Medicaid, appears in the original draft of the House Bill, its origins unexplained. *See generally Califano v. Goldfarb,* 430 U. S. 199, 223 (1977); *Royster Guano Co. v. Virginia,* 253 U. S. 412, 416 (1920).

Thus, patients in public institutions who are aged 21 through 64 and do not have their *medical* care paid for by the Medicaid program are excluded from receiving benefits under 42 U. S. C. § 1382(e)(1)(B).

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8. Medicaid only funds for medical care at institutions which it certifies as meeting minimally accepted standards for treatment. 42 U. S. C. § 1396(d)(h)(1)(A); 42 C. F. R. § 440.140(a)(1); 42 C. F. R. § 440.160(b).

B. The Unexplained and Ambiguous Exclusion From Need Benefits Violates the Due Process Clause Under Traditional Rational Basis Scrutiny.

This Court has already recognized the importance of need benefits to the indigent poor, *see Goldberg v. Kelly*, 397 U. S. 254, 264 (1970); *Dandridge v. Williams*, 397 U. S. 471, 485 (1970), and it has generally applied a very careful examination to statutory classifications which totally exclude individuals from need benefits under traditional rational basis scrutiny. *See, e.g., United States Department of Agriculture v. Moreno*, 413 U. S. 528 (1973); *United States Department of Agriculture v. Murry*, 413 U. S. 508 (1973); *see also Jiminez v. Weinberger*, 417 U. S. 828 (1974). However, it has yet to decide the issue of a statutory exclusion from need-based benefits in the context of the institutionalized mentally disabled poor.[9]

Though a "middle tier scrutiny" might apply when the mentally disabled are affected, *see, e.g., Weinberger v. Weisenfeld*, 420 U. S. 636 (1975); *Reed v. Reed*, 404 U. S. 71 (1971), this Court need not reach that question in this case in that the statutory classification in 42 U. S. C. § 1382(e)(1)(B) fails to withstand scrutiny under the careful examination this Court has regularly applied to *exclusions* from need benefits under traditional "rational basis" standards. *See United States Department of Agriculture v. Moreno, supra; United States Department of Agriculture v. Murry, supra.*

The Supplemental Security Income statute, 42 U. S. C. §§ 1381 *et seq.*, was enacted in 1972. It became effective on January 1, 1974, as a national federal program to provide cash assistance to the needy aged, blind and disabled.

9. The Third Circuit recently invalidated an exclusion of disabled individuals from need benefits by applying a similarly careful examination under traditional rational basis scrutiny in *Medora v. Colautti*, 602 F. 2d 1149, 1153 (3d Cir. 1979).

The program was designed, *inter alia,* to provide:

1. An income source for the aged, blind and disabled whose income and resources fell below a specified level; and
2. Incentives and opportunities for those able to work or to be rehabilitated that will enable them to escape from their dependent situations.

1972 U. S. CODE CONG. & ADM. NEWS, *supra* at 5136. Congress intended the SSI program to provide *comprehensive* cash assistance to persons who were aged, blind or disabled, when existing programs failed to adequately provide for their needs. *Id.*

The exclusion in 42 U. S. C. § 1382(e)(1)(B) is entirely inconsistent with these articulated purposes of the Supplemental Security Income program. First, since a personal need allowance is necessary to a minimally dignified level of subsistence in the institution, *see* 1972 U. S. CODE CONG. & ADM. NEWS, *supra* at 5136; *Koe v. Califano,* 573 F. 2d 763 N. 5; GOFFMAN, *supra* at 18-20, 44, 51, 296, the exclusion of persons aged 21 through 64 directly contravenes the Congressional intention to comprehensively provide cash assistance to those whose income and resources fall below a certain level, 1972 U. S. CODE CONG. & ADM. NEWS, *supra* at 5136, and to provide for the unmet needs of the disabled poor. *Id.* at 5133.

Secondly, because the personal need allowance promotes the rehabilitation and discharge of the mentally ill patient, *see, e.g.,* GREENBLATT, YORK & BROWN, *supra;* WOLFENSBERGER, NORMALIZATION IN HUMAN SERVICES, *supra* at 87, 92, the withholding of the allowance becomes similarly inconsistent with the Congressional intention to create incentives and opportunities for those able to be rehabilitated to escape their dependent situation. 1972 U. S. CODE CONG. & ADM. NEWS, *supra* at 5133.

The exclusion from benefits under 42 U. S. C. § 1382(e)(1)(B) is of course also inconsistent with the single paragraph in the House Report referring to the personal need allowance which ties the receipt of SSI benefits to the *institution's* receipt of Medicaid. *Compare* 1972 U. S. CODE CONG. & ADM. NEWS, *supra* at 5133 *with* 42 U. S. C. § 1382(e)(1)(B). Being both unrelated to the underlying purposes of the SSI scheme and inconsistent with the language in the Legislative History dealing with personal need benefits, the classification cannot withstand scrutiny under the careful application of the rational basis test which is applied to need-based exclusions. *See United States Department of Agriculture v. Moreno, supra; Medora v. Colautti, supra.*

From a historical perspective,[10] the exclusion makes no more sense. By 1972, when the SSI statute was enacted, it had become official government policy to encourage community care for the mentally ill. S. BRAKEL & R. ROCK, THE MENTALLY DISABLED AND THE LAW 8-9 (1971); 42 U. S. C. § 2689 *et seq.* (Supp.); H. REP. NO. 694, 88th Cong., 1st Sess., 5 (1963) *reprinted in* [1963] U. S. CODE CONG. & ADM. NEWS 1058. To the extent the SSI allowance encourages patient rehabilitation and community care, the exclusion is also inconsistent with the then existent Congressional policy to encourage care in the community.

Recently, in 1978, the Task Panel on Deinstitutionalization, Rehabilitation, and Long-Term Care for the President's Commission on Mental Health recommended that:

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10. The historical context within which the statute was enacted may be relevant to the intended purposes of the statutory language in the statute. *See Maine v. Thiboutot*, 48 U. S. L. W. 4859, 4863 (June 25, 1980) (Powell, Burger & Rehnquist dissenting in an opinion construing 42 U. S. C. § 1983).

> Federal funds whether for health, mental health, social services, or *personal income maintenance* be provided on a nondiscriminatory basis for the chronically mentally disabled regardless of age or whether the individual is residing in or being served by a public or private facility.

TASK PANEL REPORT SUBMITTED TO THE PRESIDENT'S COMMISSION ON MENTAL HEALTH 360, 369-370 (1978) (emphasis added). As this brief has demonstrated, in the context of the SSI classification in this case that recommendation is constitutionally mandated.

CONCLUSION

For the reasons articulated within, and the vitally important nature of the benefits to the indigent institutional plaintiffs affected, Amici join with appellees to urge the invalidation of the classification in 42 U. S. C. § 1382 (e)(1)(B). The district court judgment should be affirmed.

Respectfully submitted,

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No. 79-1380

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IN THE

Supreme Court of the United States

October Term, 1980

PATRICIA R. HARRIS, Secretary of Health and Human Services,

Appellant,

v.

CHARLES EDWARD WILSON, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR THE NEW YORK, PENNSYLVANIA, AND CALIFORNIA ASSOCIATIONS OF PRIVATE PSYCHIATRIC HOSPITALS AS *AMICI CURIAE*

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October 1980

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BRIEF FOR THE NEW YORK, PENNSYLVANIA, AND CALIFORNIA ASSOCIATIONS OF PRIVATE PSYCHIATRIC HOSPITALS AS *AMICI CURIAE*

In accordance with this Court's Rule 36, the New York, Pennsylvania and California Associations of Private Psychiatric Hospitals have received the written consent of counsel for both parties to file this brief as *amici curiae*. Copies of the consents have been filed with the Clerk.

INTEREST OF *AMICI CURIAE*

The Associations consist of 54 of the 185 member secular and religious not-for-profit and investor-owned hospitals of the National Association of Private Psychiatric Hospitals. The

National Association was established in 1933. Its members annually provide more than 23,000 beds to treat 148,000 inpatients of all socioeconomic classes. Each member hospital is accredited by the Joint Commission on Accreditation of Hospitals, a prerequisite for participation as a provider in the Medicare and Medicaid programs (Titles XVIII and XIX of the Social Security Act). The Association is in the forefront of the diagnosis, treatment and research into mental illness, and has trained thousands of the nation's physicians, including some of the most prominent clinicians in American psychiatry. Private psychiatric hospitals have been significant providers of psychiatric services since the eighteenth century and continue that tradition as major participants in the Medicare and Medicaid programs. They are uniquely qualified to advise the Court respecting the full scope of its decision in this case and the impact it will have on the status and treatment of the mentally ill. The Associations, as members of the "psychiatric community," have long been aware of the attitudes that have stigmatized the mentally ill, in general, and the indigent mentally ill, in particular.

PARTY SUPPORTED

Amici curiae support the Appellees and pray that the Court affirm the decision of the District Court. *Sterling v. Harris,* 478 F.Supp. 1046 (N.D.Ill. 1979), *prob. juris. noted sub nom. Harris v. Wilson,* 100 S. Ct. 2938 (1980).

BACKGROUND

The Supplemental Security Income Program

The Supplemental Security Income Program consists of two components: one for persons who are institutionalized (the "inpatient" benefit in issue here) and one for those who are not. The program was enacted to provide financial assistance to the

aged, blind, and disabled poor.[1] The scheme of the program, which is outlined in Figure A, is to provide income maintenance depending upon need. Persons who are indigent and blind, aged, or disabled, and who are not institutionalized, qualify for full income maintenance. This is shown in the "Full Coverage" column of Figure A. Persons who are indigent and blind, aged, or disabled, and who are in institutions where bed and board are provided, do not require the full income maintenance payments, and therefore receive smaller payments of up to $25 per month for small comfort items. This is the inpatient benefit and is shown in the "Reduced Coverage" column of Figure A.

Persons who are not indigent, or who are not blind, aged, or disabled, do not qualify for SSI coverage under either component. However, they are not the only ones who do not qualify: certain indigent persons, whose particular disability is mental illness, are excluded from SSI participation under the inpatient component. §1611(e)(1) of the Social Security Act, 42 U.S.C. § 1382(c)(1) (1976). This is illustrated in the last entry of the "No Coverage" column of Figure A. It results from the exception and re-inclusion provisions of §1611(e) which incorporate the Medicaid eligibility criteria into the SSI program by reference. It is this anomaly which gives rise to the present litigation.

The Mental Health Anomaly

Although the Act's purpose extends to "every aged, blind, or disabled individual who is determined under part A to be eligible on the basis of his income and resources . . .",[2] an

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[1] Pub. L. No. 92-603, Title III, §§301, 302, 86 Stat. 1329, 1465, 42 U.S.C. §§1381a, 1382, (1972) amending Title XVI of the Social Security Act, 42 U.S.C. § 1381 *et seq.* The term "disabled" includes the mentally ill. Section 1614 of the Social Security Act, 42 U.S.C. 1382c(3)(1976).

[2] Section 1602 of the Social Security Act, 42 U.S.C. § 1381a (1976).

exception from eligibility is made of any person who throughout a month is an "inmate of a public institution."[3] This is a misleading provision because, in fact, no inmate of a public medical institution is excluded from SSI benefits simply because he is such an "inmate."[4] The program coverage which is taken away by Section 1611(e)(1)(A) of the Act is partially restored to some by Section 1611(e)(1)(B)[5] which provides a monthly allowance for small personal comfort items for inpatients. This reduced-payment provision provides that an individual who throughout a month is in a hospital, extended care facility, nursing home, or intermediate care facility (public or private) receiving payments with respect to such individual under a State plan approved under Title XIX (Medicaid) may receive up to $25 per month. Thus, although "inmates" of public institutions are excluded from full SSI benefits, they nonetheless receive the same partial benefits which residents of private institutions receive if they are in institutions which are receiving medical assistance payments on their behalf under the Medicaid program. The "inmates" who fail to fall within the reincluded category are the tubercular and the mentally ill.

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[3] Section 1611(e)(1)(A) of the Social Security Act, 42 U.S.C. §1382 (e)(1)(A). Section 1611(e)(1)(C) was added to the Social Security Act by Pub. L. No. 94-566, Title V, §505(a), 42 U.S.C. § 1382(e)(1)(C), 90 Stat. 2667, 2686, (1976) to provide that the §1611(e)(1)(A) exclusion of inmates of public institutions does not apply to a publicly operated community residence which serves no more than 16 residents.

[4] The "except as provided" language of §1611(e)(1)(A) makes it clear that inmates of all public institutions, *per se*, are not excluded, only those not covered by §1611(e)(1) (B) and (C).

[5] 42 U.S.C. §1382(e)(1)(B)(1976). This provision applies to *any* resident of an institution, not just residents of public institutions.

Figure A
SSI PROGRAM COVERAGE

FULL COVERAGE if:	REDUCED COVERAGE if:	NO COVERAGE if:
Indigent[1]	Indigent[1]	Not indigent[1]
and	**and**	**or**
Aged, blind or disabled[1]	Aged, blind or disabled[1]	Not aged, blind or disabled[1]
and	**and**	
Not in public institution with Medicaid coverage[2]	In public institution with Medicaid coverage[3]	
and	**or**	
Not in private institution with Medicaid coverage[2]	In private institution with Medicaid coverage[4]	
		or
		In public institution with no Medicaid coverage[3]
or		
In private institution with no Medicaid coverage[5]		

[1] §1611(a)(1) and (2).

[2] §1611(b); "medicaid coverage" refers to payments received on behalf of the individual concerned.

[3] §1611e(1)(A) and (B).

[4] §1611(e)(1)(B).

[5] §1611(b), (e)(1)(B). This loophole has little practical effect. *See infra* n. 13.

The Medicaid Exclusion

Congress established the Medicaid program in 1965 by amending the Social Security Act to provide a new Title XIX, "Grants to States for Medical Assistance Programs".[6] Coverage

[6] Pub. L. No. 89-97, §121(a), 42 U.S.C. §1396 *et seq.*, 79 Stat. 286 (1965).

under Medicaid was limited by defining the term "medical assistance" conjunctively to mean (1) payment of the cost of certain services, as (2) provided to certain needy persons.[7] In pertinent part, the "persons" included were those under the age of 21, those 65 years of age or older, and permanently and totally disabled persons of 18 years of age or older.[8] "Services" were defined to mean most medical services, including:

> "(1) inpatient hospital services (other than services in an institution for tuberculosis or mental diseases);
>
> * * * * *
>
> (4) skilled nursing home services (other than services in an institution for tuberculosis or mental diseases) for individuals 21 years of age or older;
>
> * * * * *
>
> (14) inpatient hospital services and skilled nursing home services for individuals 65 years of age or over in an institution for tuberculosis or mental diseases; and
>
> (15) any other medical care, and any other type of remedial care recognized under State law, specified by the Secretary;

except that such term ["medical assistance"] does not include—

> (A) any such payments with respect to care or services for any individual who is an inmate of a public institution (except as a patient in a medical institution); or

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[7] Pub. L. No. 89-97, §121(a), 79 Stat. 286, establishing §1905 of the Social Security Act (currently found at 42 U.S.C. §1396d(a), as subsequently amended).

[8] *Id.*

(B) any such payments with respect to care or services for any individual who has not attained 65 years of age and who is a patient in an institution for tuberculosis or mental diseases."[9]

Subsequently, Congress amended §1905(a) of the Social Security Act to add inpatient psychiatric hospital services involving active treatment of persons under age 21 to the list of covered services.[10]

By definition, persons who are patients in an institution for mental diseases or who are receiving inpatient psychiatric hospital services are persons with a mental disease, that is, they are mentally ill.[11] Thus, the effect of these provisions is to deny Medicaid coverage for inpatient mental hospital services to all mentally ill persons between the ages of 21 and 65, and mentally ill persons under age 21 who are not undergoing active treatment, if they are patients in an institution for mental illness.[12]

SUMMARY OF ARGUMENT

The court below correctly held that the exclusion of Supplemental Security Income benefits to mentally ill individuals under §1611(e)(1) constitutes a classification based on mental illness. But for their status as mentally ill persons,

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[9] *Id.* The provisions of §1905(a)(15)(A) and (B) of the Social Security Act as originally passed are now found at §1905(a)(17)(A) and (B), 42 U.S.C. §§1396d(a)(17)(A) and (B) (1976 & Supp. II 1978).

[10] Pub. L. No. 92-603, §299(B), 88 Stat. 1329 (1972), §1905(a)(16), 42 U.S.C. §1396d(a)(16).

[11] *See, e.g.*, 42 C.F.R. §435.1009 (1979), definition of "[i]nstitution for mental diseases."

[12] The exclusion of Medicaid coverage is not limited to public mental institutions, but applies to all mental institutions, private as well as public, serving the excluded age groups.

Appellee class members would be entitled to payments of up to twenty-five dollars ($25) per month under the Supplemental Security Income program, Title XVI of the Social Security Act. The exclusion of Appellees from benefits is based on their status as mentally ill. The constitutional right of equal protection requires that statutory classifications based on mental illness be subjected to heightened judicial scrutiny. A heightened degree of judicial scrutiny is proper when a statute groups people together under a classification considered sensitive for purposes of equal protection analysis.

The court below applied the factors this Court has considered in determining when to engage in heightened judicial scrutiny and concluded that a classification based upon mental illness required closer scrutiny. The court below was correct in its conclusion and should be affirmed. The stigma of mental illness is manifest in our legal institutions and in interpersonal and societal relationships. It is still widely misunderstood in our society, and therefore subject to inaccurate generalizations and stereotyping. Because mental illness has been misunderstood and feared, persons labeled mentally ill have thereby obtained a peculiarly disfavored status, a badge of "opprobrium." Persons labeled mentally ill by our society do not choose to be subjected to the disabilities of that status, and cannot voluntarily choose to escape that status. Having created the disfavored status of mental illness, our society, its institutions and its laws, then impose disabilities on persons bearing that status.

Although the precise question what level of scrutiny should be given to a classification based upon mental illness has not yet been addressed by this Court, its prior decisions demonstrate that heightened judicial scrutiny is required. The mentally ill are a group "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment . . . as to command extraordinary protection . . . ." *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1, 28 (1973). Equal protection requires heightened judicial scrutiny of a classification which

applies long-standing and outmoded stereotypes and stigmatizes members of a group, affects a "discrete and insular minority" unable effectively to make its voice heard in the political process, and relates to a characteristic over which individuals have little or no control. A classification based upon mental illness is such a classification. This Court has recognized the need for special judicial protection of the mentally ill by providing them with particular procedural protections against deprivations of their rights. These supplementary procedural protections show that this Court recognizes that our society is inclined to deprive invidiously the mentally ill of their rights. This tendency requires that a classification based on mental illness needs heightened judicial scrutiny in the equal protection area.

The district court correctly held that, under heightened scrutiny, the statutory provision here in question must fall as not substantially related to the achievement of any important governmental objective. Congress' intent in establishing the Supplemental Security Income inpatient component, which provides partial benefits to those in public and private medical institutions, was to provide small sums to the needy aged, blind, and disabled to enable them to purchase small comfort items not supplied by the institution, items such as personal toilet articles, reading materials, and items of clothing. Although the Appellant suggests that conservation of public funds is a basis for excluding small payments to the mentally ill in institutions, such a motive cannot survive heightened judicial scrutiny. Extension of benefits to the excluded mentally ill would cost a miniscule fraction of total expenditures of the Social Security Act programs. There is no substantial relationship between this exclusion and the general provision of the small social welfare benefit that is the aim of this part of the SSI program. There is, moreover, no interest in federal-state comity served by the exclusion, and certainly no substantial interest served. The exclusion must fall.

ARGUMENT

I.

THE DISTRICT COURT CORRECTLY HELD THAT THE SUPPLEMENTAL SECURITY INCOME STATUTE WHICH DENIES INPATIENT BENEFITS TO PERSONS IN MENTAL INSTITUTIONS EMPLOYS A CLASSIFICATION BASED ON MENTAL ILLNESS

As Appellant acknowledges (Appellant's Brief at 18-19), "[t]he question whether mental health classifications must be viewed under [a] stricter standard is an important one that may some day require resolution by the Court." *Amici* respectfully submit that the day has come: the intended purpose and effect of the Supplemental Security Income (SSI) Program's incorporation (Social Security Act §1611(e)(1)(B), 42 U.S.C. §1382(e)(1)(B) (1976)) of Medicaid qualification criteria (Social Security Act §1905(a), as amended, 42 U.S.C. §1396d(a)(1976 & Supp. II 1978)) is categorically to exclude mentally ill persons from SSI inpatient benefits because of their mental illness.[13]

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[13] Appellant attempts (Appellant's Brief at 16 n. 10, 20) to make much of the fact that, on the face of the statute, persons excluded from Medicaid coverage who are patients in private institutions are not disqualified from full benefits, as opposed to partial SSI inpatient benefits. Appellant's reliance on this point is misplaced. The Congressional interest in enacting the SSI scheme was to provide significant assistance to the non-institutionalized indigent, to provide partial assistance in the form of a monthly allowance for personal comfort items to those indigents who were institutionalized, and to provide nothing to those who were not indigent. Congress did not intend to provide full SSI benefits to the privately institutionalized mentally ill. While certain inpatients may be entitled to full SSI benefits on the face of the statute (see last entry in the first column of Figure A, *supra*), this constitutes an unintended loophole. Moreover, few individuals actually can qualify for full SSI benefits under the

(*footnote continues*)

What Appellees are contesting in this case is their exclusion from the partial SSI inpatient benefit payments which they would be receiving but for their status as mentally ill persons. They are not contesting their exclusion from full SSI benefits by virtue of their residence in an institution (public or private). (*See* Figure A, last entry in "No Coverage" column.) The Appellant has advanced the argument that Appellees are excluded, not because they are mentally ill but, rather, because they are in mental institutions. Appellant's Brief at 20. This distinction without a difference does not alter the fact: the statute is aimed at the mentally ill and it has hit the mark.[14]

(*footnote continued*)

loophole: as a practical matter, few if any persons who can afford private hospitalization without Medicaid assistance would nevertheless qualify as indigents for the purposes of SSI coverage. The only real example that comes to mind is an indigent who has a rich benefactor willing to pay for private hospitalization but who is at the same time unwilling to provide additional monies for the upkeep of the indigent beneficiary. The apparent loophole classification 'indigent persons not qualifying for Medicaid and resident in private institutions' is, for all practical purposes, an empty set. In any event, Appellees are not contesting their exclusion from full benefits for the non-institutionalized. Rather, they are contesting their exclusion from the inpatient benefit for those who are institutionalized.

[14] Thus, Appellant's reliance (Appellant's Brief at 22) on *Harris v. McRae,* 100 S. Ct. 2671 (1980), is misplaced: *Harris v. McRae* is authority for the proposition that Congress may, absent an invidious classification, choose to fund some but not all medical services under a medical assistance program. However, the classification in issue here is used not to regulate the receipt of medical services, but in the context of a federal income maintenance program. So used, this classification is not only invidious, but was selected because of its impact and not in spite of it. *See also General Electric Co. v. Gilbert,* 429 U.S. 125 (1976) (employer may exclude pregnancy benefits from an employee disability plan consistently with Title VII of the Civil Rights Act.).

The Medicaid program excludes coverage to a group of eligible mentally ill persons that would otherwise be covered were they not mentally ill. That group consists of those persons in an institution for mental illness under the age of 21 not undergoing active treatment and those between the ages of 21 and 65. The effect of this statute is clear: a large group of mentally ill persons, otherwise eligible, is excluded from coverage. When Congress incorporated the Medicaid coverage criteria into the SSI eligibility formula, it did not specifically express its intent in the legislative history. Congress was surely aware, however, when it enacted the SSI statute and incorporated into it Medicaid coverage requirements, that those requirements included a severe limitation on payments to the mentally ill. In the same bill which enacted the SSI program in 1972 as Title XVI of the Social Security Act, Congress also amended the Medicaid program, Title XIX of the Act. Included in these amendments was extension of Medicaid coverage to inpatients in psychiatric hospitals under the age of 21 undergoing active treatment.[15] Also under consideration was a provision in the Senate bill authorizing demonstration projects to determine whether coverage under Medicaid should be extended to persons between the ages of 21 and 65 in mental hospitals.[16] Congress was clearly cognizant that payments to the mentally ill under Medicaid were considerably limited, in that it had before it—and rejected—proposals to extend that very coverage.[17] The effect of the incorporation of the Medicaid coverage criteria into the SSI program is again clear: a large group of mentally ill persons otherwise eligible is excluded from coverage.

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[15] Social Security Amendments of 1972, Pub. L. No. 92-603, §299(B), 86 Stat. 1329, §1905(a)(16) of the Social Security Act, 42 U.S.C. §1396d(a)(16) (1972).

[16] H.R. Rep. No. 1605, 92d Cong., 2d Sess. (conference report) *reprinted in* [1972] U.S. Code Cong. & Ad. News 5370, 5398.

[17] The Appellant adopts this position. *See* Appellant's Brief at 34.

This classification has the effect of denying benefits to otherwise eligible individuals because they are mentally ill. The SSI legislative scheme, by incorporating the Medicaid eligibility criteria, as surely excludes mentally ill persons—and as precisely—as if the Congress had legislated a provision which recited that no person otherwise eligible for SSI inpatient benefits may receive them if he is mentally ill and between the ages of 21 and 65. Surely this Court would consider that a classification based on race were at issue if a statute stated that no blacks between the ages of 21 and 65 would obtain the benefit. The situation is no different in this compound classification. Notwithstanding additional qualifications, a classification based on mental illness is still at issue and is the effective category excluding the persons involved. *See e.g., Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972). In *Weber*, the Court considered the provision in the Louisiana workman's compensation laws that denied an equal right of recovery to unacknowledged illegitimate children, as opposed to both legitimate and acknowledged illegitimate children. The Court considered that the classification at issue was one based on illegitimacy. *See id.* at 172. The lower court had considered significant the fact that not all illegitimates were barred from recovery, but only some. This Court rejected that approach. *Id.* 168-69. So, too, in the instant case, the fact that some statutory qualifications permit certain mentally ill persons (those being treated in general hospitals) to obtain the SSI inpatient benefit does not negate the basic classification before this Court. A classification based upon mental illness is clearly at issue. The juxtaposition of legitimate classifications with invidious classifications does not justify the latter. The court below held (478 F. Supp. 1046, 1049) that the Appellees were denied reduced SSI payments because of a classification based on mental illness. That conclusion should be upheld.

II.

THE CONSTITUTIONAL RIGHT OF EQUAL PROTECTION REQUIRES THAT A STATUTORY CLASSIFICATION BASED ON MENTAL ILLNESS BE SUBJECTED TO HEIGHTENED JUDICIAL SCRUTINY

When a statutory classification restricts benefits to or burdens a group entitled to special judicial protection or burdens certain fundamental rights, the constitutional right to equal protection of the laws requires that a statutory classification bear more than merely a rational relationship to a colorably legitimate governmental interest. This Court has recognized that heightened scrutiny of certain classifications is appropriate. A racial classification is generally subject to strict scrutiny, *e.g., compare Loving v. Virginia,* 388 U.S. 1 (1967) *with Regents of the University of California v. Bakke,* 438 U.S. 265, 356 (1978) (opinion of Brennan, White, Marshall and Blackmun, JJ).[18] A classification based upon alienage usually requires strict scrutiny, *compare Graham v. Richardson,* 403 U.S. 365 (1971) *and Sugarman v. Dougall,* 413 U.S. 634 (1973) *with Foley v. Connelie,* 435 U.S. 291 (1978) ("reasonable basis" test applies to exclusion of aliens from democratic political institutions). A heightened degree of judicial scrutiny is proper when a statute groups people together under a classification considered sensitive for purposes of equal protection. *See, e.g., Craig v. Boren* 429 U.S. 190 (1976) (gender); *Trimble v. Gordon,* 430 U.S. 762 (1977) (illegitimacy).

The court below applied the factors this Court has considered in determining when to engage in heightened judicial scrutiny and concluded that a classification based upon mental illness requires such scrutiny. The court below was correct in its conclusion and should be affirmed. The stigma of mental illness is manifest in our legal institutions and in interpersonal

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[18] These Justices considered that a racial classification meeting certain articulated tests, while requiring heightened judicial scrutiny, ought not to be subject to the most demanding standard.

and societal relationships. Mental illness is still widely misunderstood in our society, and therefore subject to inaccurate generalizations and stereotyping. Because mental illness has been so misunderstood and feared, persons labeled mentally ill have thereby obtained a peculiarly disfavored status, a badge of "opprobrium."[19] Persons labeled mentally ill by our society do not choose to be subjected to the disabilities of that status, and cannot voluntarily choose to escape that status. Having created the disfavored status of the mentally ill, our society, its institutions and its laws, then impose disabilities on persons bearing that status.[20]

This Court has concluded that a group "saddled with such disabilities or subject to such a history of purposeful unequal treatment" is entitled to a heightened degree of judicial scrutiny of classifications affecting their rights, *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1, 28 (1973). In so doing, the Court has shown that when society applies long-standing and outmoded stereotypes and stigmatizes members of a group, that group classification requires heightened judicial scrutiny.

The question of what level of scrutiny should be given to a classification based upon mental illness has not yet been directly addressed by this Court.[21] In his concurring opinion in

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[19] *See generally Developments in the Law—Civil Commitment of the Mentally Ill,* 87 Harv. L. Rev. 1190, 1200 (1974).

[20] *Id.* at 1193-201.

[21] This Court's summary affirmance of *Legion v. Richardson,* 354 F. Supp. 456 (S.D.N.Y.), at 414 U.S. 1058 (1973) *sub nom. Legion v. Weinberger* is not authority to the contrary. *Legion,* which considered the viability of the Medicare and Medicaid exclusions, parts of programs designed for medical assistance, is no authority for this Court considering the SSI program under Title XVI of the Social Security Act, a social welfare program with a completely different thrust. At issue in *Legion* was the limited coverage for psychiatric services provided by Medicare (Title XVIII of the Social Security

(*footnote continues*)

O'Connor v. Donaldson, 422 U.S. 563, 583 (1975), the Chief Justice considered what due process would require of a program for the protection of the mentally ill:

> At a minimum, a particular scheme for protection of the mentally ill must rest upon a legislative determination that it is compatible with the best interests of the affected class and that its members are unable to act for themselves. Moreover, the use of alternative forms of protection may be motivated by different considerations, and the justifications for one may not be invoked to rationalize another. (citations omitted)

In the instance of a program specially directed towards the mentally ill, the Chief Justice would require a legislative determination of the propriety of the system applied and of each element involved. This requirement that the legislature focus carefully upon each element of its program for the mentally ill and that the courts accept only an articulated

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(*footnote continued*)

Act) and the exclusion from coverage provided by Medicaid (Title XIX) of individuals under age 65 in institutions for mental diseases. The lower court considered that the statutes classified on the basis of those requiring long-term care and those requiring short-term care. It applied the "rational basis" test to this classification, and upheld the statute, alluding to "the belief by Congress that care of the mentally ill in state hospitals was the responsibility of the states." 354 F. Supp. at 459. Dealing with both the Medicare and Medicaid programs, *Legion* considered that the putative classifications at issue concerned blacks or poor persons, and did not address the question whether a classification based on mental illness was at issue.

Nor is contrary authority found in *Kantrowitz v. Weinberger,* 388 F. Supp. 1127 (D.D.C. 1974), *aff'd,* 530 F.2d 1034 (D.C. Cir.), *cert. denied,* 429 U.S. 819 (1976) upholding the Medicaid exclusion, now encompassing those aged 21-65 years, on the basis of *Legion. Kantrowitz* scrutinized the exclusion on a theory that an age classification, and not a mental illness classification, was at issue.

rationale for each element is certainly a more careful degree of judicial scrutiny of a legislative program than that normally accorded under the "reasonable basis" test, with its great deference to the legislative will. The test that the Chief Justice requires for a legislative program regarding the mentally ill appears much closer to the degree of judicial oversight required under a heightened scrutiny for equal protection purposes: a classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation", *Reed v. Reed,* 404 U.S. 71, 76 (1971) (*quoting Royster Guano Co. v. Virginia,* 253 U.S. 412, 415 (1920)); a classification "must serve important governmental objectives and must be substantially related to achievement of those objectives." *Califano v. Webster,* 430 U.S. 313, 316-17 (1977) (*quoting Craig v. Boren,* 429 U.S. 190, 197 (1976)). If such legislation, the chief purpose of which is to deal with the mentally ill, requires this heightened scrutiny, then a classification based upon mental illness must constitutionally be given a closer judicial look than that accorded by the "reasonable basis" test.

This Court has in the past provided special procedural protections against deprivations of rights inflicted upon individuals because they are mentally ill. *O'Connor v. Donaldson,* 422 U.S. 563 (1975), held that a state cannot constitutionally confine the nondangerous mentally ill if they can survive in the community with the help of willing family and friends. *Addington v. Texas,* 441 U.S. 418 (1979), held that a "clear and convincing" standard of proof is required in civil commitment proceedings. *Vitek v. Jones,* 100 S. Ct. 1254, 1264 (1980), held that a prisoner cannot be involuntarily transferred to a mental hospital without minimum due process procedures, since classifying an individual as "mentally ill" and the "stigmatizing consequences of a transfer to a mental hospital," along with subjection to involuntary psychiatric treatment, constitute deprivation of constitutionally-protected liberty. If such supplementary procedural protections are required to protect an

individual in the process of classification as mentally ill then utilization of that classification should be considered enough for this Court to take a close look, for purposes of equal protection, at its usage in statutes.

A number of factors have been considered by this Court in determining whether a classification requires heightened scrutiny: 1) whether the group so classified is a discrete and insular minority and unable effectively to make its voice heard in the political process; 2) whether society subjects the group so classified to stigma and negative stereotypes and whether the classification serves to perpetuate a feeling of inferiority among the members of the group as to their status in the community; 3) whether the characteristic serving as the basis of the classification relates to the ability to perform or contribute to society; and 4) whether the characteristic is one over which the individual has no control. By these criteria, a classification based upon mental illness requires heightened scrutiny.

Political Weakness

When a group is politically impotent or unable to engage effectively in political give-and-take among interest groups, when it is a discrete and insular minority, this Court has considered heightened scrutiny appropriate for classifications affecting that group. *Sugarman v. Dougall*, 413 U.S. 634, 642 (1973); *Graham v. Richardson*, 403 U.S. 365, 371-72 (1971); *see United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938).[22] The disabilities affecting the participation of the mentally ill in the political process are considerable.

As noted by the court below, patients in mental institutions may have only a limited right of association and have difficulty

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[22] However, the propriety of drawing equal protection doctrine from the "discrete and insular" concept first articulated in the *Carolene* footnote is not unquestioned. *See, e.g.*, the dissenting opinion of Mr. Justice Rehnquist in *Sugarman v. Dougall*, 413 U.S. 634, 650-63 (1973).

in engaging in political give-and-take.[23] Among the civil incapacities which various states have imposed upon individuals civilly committed to mental institutions are prohibitions against voting, serving in public office, serving on a jury, practicing a profession, and making a contract or will. *See Developments in the Law—Civil Commitment of the Mentally Ill,* 87 Harv. L. Rev. 1190, 1198-99 (1974) and citations therein. The political impotence of the seriously mentally ill, founded upon their inability—actual or perceived—to function fully in society, is so extreme that the states have often exercised a specially intrusive power over them and reduced them to wardship. As the Chief Justice has pointed out, a state's exercise of this power substantially restrains personal freedom. *O'Connor v. Donaldson,* 422 U.S. at 563. This oft-exercised power to subordinate substantially and constrain the rights of the mentally ill, and even reduce the seriously ill to a wardship, indicates that the mentally ill constitute a minority sufficiently discrete and insular as to require special judicial concern for their protection.

Stigma, Stereotype, and Perpetuation of Feelings of Inferiority

In reviewing the classifications this Court has considered proper to evaluate under strict scrutiny—race, national origin, and alienage—it is clear that one concern of this Court has been those human characteristics which have been the subject of a "long history of prejudice," L. Tribe, *American Constitutional Law* 1060 (1978). That this has been an animating concern behind the "illegitmacy" cases, leading this Court to apply a heightened degree of scrutiny, is likewise clear. *See, e.g., Jimenez v. Weinberger,* 417 U.S. 628 (1974); *Weber v. Aetna Casualty & Surety Co.,* 406 U.S. 164 (1972). This Court's approach to equal protection analysis shows that groups which are traditionally disfavored because of unreflective and unanalytic lawmaking require the additional safeguard provided by heightened scrutiny. L. Tribe, *American Constitutional Law* 1090 (1978). As this Court has said, "Certain

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[23] 478 F. Supp. at 1052.

classifications . . . in themselves supply a reason to infer antipathy." *Personnel Administrator of Massachusetts v. Feeney,* 442 U.S. 256, 272 (1979). These classifications include those which "have traditionally been the touchstone for pervasive and often subtle discrimination." *Id.* at 273.[24]

This Court has recognized that the concept of "stigma" plays a role in equal protection analysis in another way. A classification may be utilized improperly to stigmatize a disfavored group in society. *See, e.g., Regents of the University of California v. Bakke,* 438 U.S. 265, 360-61 (1978) (opinion of Brennan, White, Marshall, and Blackmun, JJ.).

The mentally ill require protection under both senses of the term "stigma." The mentally ill have traditionally been a disfavored class, perceived as inferior to society as a whole. Moreover, just as a racial classification "has often been used to stigmatize politically powerless segments of society," *Fullilove v. Klutznick,* 100 S. Ct. 2758, 2796 (1980) (concurring opinion by Marshall, J.), we submit that the classification "mentally ill" has been utilized to stigmatize a politically impotent group, and to perpetuate a feeling that those so labeled are inferior.

This Court has recognized the social stigma of mental illness and the adverse consequences that attach to that status, *Vitek v. Jones,* 100 S. Ct. 1254, 1261, 1263-64 (1980); *Addington v. Texas,* 441 U.S. 418, 425-26 (1979). In *Parham v. J. R.,* 442 U.S. 584 (1979), it noted the public's "negative reaction" to "the symptomatology of mental or emotional illness." *Id.* at 601. It has recognized that the label "mentally ill" constitutes a stigma in our society. *See id.* 622 (concurring opinion by Stewart, J.); *id.* 626-27 (opinion by Brennan, J., concurring in part and dissenting in part).

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[24] *See e.g., Mathews v. Lucas,* 427 U.S. 495, 521 (1976) (dissenting opinion by Stevens, J.).

This Court has pointed out the even more pronounced adverse social reaction that is generated towards an individual committed to a mental hospital, an event which "can have a very significant impact on the individual." *Addington,* 441 U.S. at 426 (1979).

Ability to Perform or Contribute to Society

In *Frontiero v. Richardson,* 411 U.S. 677 (1973), this Court observed that classifications that are subject to heightened judicial scrutiny involve a characteristic that "frequently bears no relation to ability to perform or contribute to society." *Id.* at 686. "Mental illness" is such a classification. Neither a general classification of mental illness, nor, for that matter, a particular psychiatric diagnosis speaks directly to a specific individual's ability to perform a defined social function. Whether an individual can perform or contribute in a given instance depends on the particular nature and severity of the symptoms from which he or she is suffering. *See, e.g., Parham v. J.R.,* 442 U.S. 584, 601 (1979). Indeed, many patients are quite able to perform or contribute in a given instance since their symptoms are in remission or are controlled by therapeutic methods.[25] Thus, the misconception held by many, that an individual who is mentally ill cannot perform or contribute to society, is another example of the negative and lingering stereotyping historically burdening these affected individuals.

Involuntary Characteristic

In applying this Court's indicium of "an immutable characteristic determined solely by the accident of birth," *Frontiero v. Richardson,* 411 U.S. 677, 686 (1973), the court below concluded correctly "...that the policy behind this indicium—to extend extra protection to persons that have been identified by a factor over which they have no control—is satisfied in the case of the mentally ill." 478 F. Supp. at 1052. Despite continuing

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[25] *See, e.g.,* Klerman, Affective Disorders, in *The Harvard Guide to Modern Psychiatry* 253, 258 (A. Nicholi, Jr., *ed.* 1978) (depression).

debate as to the nature and causes of mental illness,[26] there is medical consensus that for patients hospitalized with serious mental disorders "[r]ecovery from illness is, for the most part, beyond voluntary control."[27]

Moreover, with increasing evidence of genetic,[28] biochemical,[29] and organic[30] determinants of mental illness, much

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[26] For a partial explanation, see Kety, Genetic and Biochemical Aspects of Schizophrenia, in *The Harvard Guide to Modern Psychiatry* 93, 93 (A. Nicholi, Jr., *ed.* (1978):

> The modern science of genetics has revolutionized cell biology and contributed significantly to the understanding of a large number of medical diseases. It has only recently begun to have an impact on psychiatry. A large number of problems peculiar to psychiatry have contributed to this lag. Human behavior, which is the special concern of psychiatry, is *particularly sensitive to scientific scrutiny.* Because of its real or assumed theological, social, and political implications—about which there are powerful divisions and polarizations—the study of genetic factors in normal and abnormal human behavior is sometimes seen as a threat to deeply held convictions. (emphasis added)

[27] 1 J. Zusman & W. Carnahan, *Mental Health: New York Law and Practice* 11-9 (1976). The authors explain:

> To sum up the medical-pathological model, it assumes that something has gone wrong *inside* the patient's body; that the factors leading to this are beyond the control of the patient; that expert intervention is necessary to recognize and to prescribe treatment for the disorder; and that if the treatment is appropriate, the illness will be halted or cured. *Id.*

[28] *See, e.g.,* Kessler, *The Genetics of Schizophrenia: A Review,* in 6 Schizophrenia Bull., National Institute of Mental Health 404, 411 (1980) (U.S. Dep't. of Health and Human Services):

> Individual studies—family, twin, adoption—all contain methodological problems and flaws, and can be subjected to greater or lesser criticism. Nevertheless, the overwhelming direction of the findings of all these studies, carried out in different countries and at different times, is remarkably consistent in confirming that

(*footnote continues*)

psychopathology appears to be linked with "an immutable characteristic determined solely by the accident of birth."

(*footnote continued*)

genetic factors are involved in the etiology of schizophrenia. Also, these studies confirm that although in many cases a genetic predisposition to schizophrenia may be a necessary precondition, it is by no means a sufficient condition to produce the disorder. Both genes and environment play a substantial role in the etiology of schizophrenia.

See also Klerman & Barrett, Clinical and Epidemiological Aspects of Affective Disorders, in *Lithium—Its Role in Psychiatric Research and Treatment* 201, 211-13 (S. Gershon & B. Shopsin *eds.* 1973):

> There is virtually unanimous agreement among different [international] studies in reporting an increased frequency of manic-depressive illness in the relatives of diagnosed patients .... As one review author (Winokur *et al.*, 1969) states: "There are few stable and easily reproducible findings in the field of psychiatry. One of these is that the group of primary affective disorders are familial and may be traced through several generations in many families. All studies, even the most cursory, have found this to be so, and there are no negative investigations." ... Thus, there is good evidence for a genetic factor operating in depressive illness, and the genetic material would appear to have major relevance in contributing to a meaningful and valid diagnostic classification.

[29] *See* Kety, Genetic and Biochemical Aspects of Schizophrenia, in *The Harvard Guide to Modern Psychiatry* 93, 98 (A. Nicholi, Jr., *ed.* 1978): "If genetic factors play a significant role in the etiology of schizophrenia, then biochemical factors must do so as well, since the genes can only operate through biochemical mechanisms."

See also Schildkraut, The Biochemistry of Affective Disorders: A Brief Summary, in *The Harvard Guide to Modern Psychiatry* 81, 91 (A. Nicholi, Jr., *ed.* 1978):

> Following the advances in other areas of medical nosology, many investigators now envision the development of a psychiatric nosology based not only on the clinical phenomenology of

(*footnote continues*)

Frontiero v. Richardson, 411 U.S. at 686. Unfortunately, mental illness—like race, gender and illegitimacy—has been peculiarly prone to exclusionary legislative classifications and, therefore, such a classification is most in need of sensitive judicial scrutiny.[31]

It is thus clear that under the principles enunciated by this Court, a classification based upon mental illness requires heightened scrutiny under the doctrine of equal protection of the laws. This Court must thus consider whether the exclusion from SSI inpatient benefits at issue can withstand this closer scrutiny.

(*footnote continued*)

affective disorders but also on knowledge of the biochemical mechanisms underlying these phenomena. It now seems likely that the biochemical tests may become as routine in the diagnostic workup of patients with affective disorders as they are currently in the evaluation of patients with other types of metabolic disorders.

[30] *See* Seltzer & Frazier, Organic Mental Disorders, in *The Harvard Guide to Modern Psychiatry* 297, 297 (A. Nicholi, Jr., *ed.* 1978):

Organic mental disorders are very common. Although precise data are difficult to find, some authorities estimate that they account for one out of five first admissions to a mental hospital (NIMH, 1966) and also occur frequently in general hospitals (Reding and Daniels, 1964; Lipowski, 1967b). Over 50 percent of geriatric patients in mental hospitals have this diagnosis (Riley and Foner, 1968), and many elderly people in the community also suffer from some degree of organic mental impairment (Broe et al., 1976).

[31] *See generally* G. Allport, *The Nature of Prejudice* 178-83, 245-46 (1954). Allport observes that "... the name of *any* deviant carries with it *ipso facto* a negative value-judgment. Words like *insane, alcoholic, pervert* are presumably neutral designations of a human condition, but they are more: they are finger-pointings at deviance." *Id.* at 182-83.

III.

THE DISTRICT COURT CORRECTLY HELD THAT THE STATUTORY CLASSIFICATION IS NOT SUBSTANTIALLY RELATED TO THE ACHIEVEMENT OF IMPORTANT GOVERNMENTAL OBJECTIVES

The classification at work in this case, like others of the kind discussed above, should be subjected to a more than casual judicial review. "This Court's recent cases teach that such classifications must bear a close and substantial relationship to important governmental objectives [citation omitted]". *Personnel Administrator of Massachusetts v. Feeney,* 442 U.S. 256, 273 (1979). *See also Caban v. Mohammed,* 441 U.S. 380, 391 (1979).

A. The classification bears no substantial relation to the object of the legislation.

Congress' purpose in establishing the Supplemental Security Income Program was "to provide supplemental security income to ... [e]very aged, blind, or disabled individual who is determined under part A to be eligible on the basis of his income and resources. . . ."[32] For most indigent inpatients, Congress provided a lesser amount, stating that such persons do not need full benefits because most of their subsistence needs are provided for by their institution.[33] It was Congress' intent to provide small payments needed by these people to enable them

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[32] Social Security Act §§1601, 1602, Pub. L. No. 92-603, 42 U.S.C. §§1381, 1381a, 86 Stat. 1329 (1972).

[33] See H.R. Rep. No. 231, 92d Cong., 2d Sess., *reprinted in* [1972] U.S. Code Cong. and Ad. News 4989, 5136. The *Amici* agree with Appellant (Appellant's Brief at 33) that the SSI exclusion of residents of non-Medicaid institutions was deliberate. However, deliberate arbitrariness and deliberate unreasonableness are no less oppressive and objectionable to the Constitution than if they are inadvertent.

to purchase small comfort items not supplied by the institution.[34] In practice, patients have used these payments to purchase such items as personal toilet articles, reading materials, articles of non-institutional clothing, and similar items which lend personal dignity otherwise wanting in the lives of many of the institutionalized poor. These payments are in no way related to the treatment which an individual receives and his disposition of them is discretionary, often, the only significant exercise of discretion available to such an individual. The costs of the program, a maximum of $25 per month for each individual, are relatively small and, when compared with the balance of the Social Security Program, pale into insignificance. Yet its benefits, in terms of human dignity, are substantial.

Appellant has suggested (Appellant's Brief at 27) that Congress denied SSI inpatient benefits to persons in mental institutions in order to avoid spending federal resources on behalf of individuals whose "care and treatment" are being fully provided for by State and local governments. This suggestion is patently false. Congress specifically recognized that institutions generally do not supply the "small comfort items" which the partial payments fund.[35] Congress did not intend that these payments be made "on behalf" of anyone; Medicaid payments are made for medical services to institutions "on behalf" of their patients,[36] but SSI payments are made for non-medical purposes directly to individuals.[37] SSI inpatient benefits are for personal comfort items and are not for care and treatment.[38]

Appellant's implication that fiscal conservation was a contributing purpose is without reasonable foundation. Appellant has estimated that affirmance of the district court's decision would result in additional expenditures to members of Ap-

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[34] *Id.*

[35] *Supra* note 33 at 25.

[36] 42 U.S.C. §1396 (1976 & Supp. II 1978).

[37] 42 U.S.C. §1381a (1976).

[38] *Supra* note 33 at 25.

pellees' class of $30 million, nationwide. (Appellant's Reply Memorandum at 3). This represents less than 1% of all SSI payments for which funds were requested of the Congress by the President for fiscal year 1981, and 1/70 of 1% of all planned expenditures for Social Security Act Programs.[39] In short, Congress did not intend to exclude the mentally ill from SSI inpatient benefits because it wanted to save money, or because it thought they received equivalent benefits from state or local governments. It excluded them simply because it determined to do so, and it employed the Medicaid eligibility formula to accomplish this purpose. That formula, however suitable for identifying the medical services Congress wished to support, is not substantially related to the provision of SSI income maintenance payments. As this Court has noted, there is a vast difference between a statute which refuses to subsidize a certain activity, program or service and one which provides a broad disqualification from receipt of public benefits.[40] The Medicaid eligibility criteria, when used for the purposes of the Medicaid program, arguably fall into the former permissible category; but when used for the purposes of the SSI program, they clearly fall into the latter impermissible one.

The personal comfort needs of the mentally ill and the physically ill do not differ in any significant way. If anything,

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[39] U.S. Department of Health and Human Services, *The Fiscal Year 1981 Budget,* For Release at 10:00 AM (EST), January 28, 1980. FY 81 expenditures requested for SSI payments were $4.2 billion; for all Social Security Act programs, $209 billion. *Id.* at 58, 2. In any event, the mere saving of welfare costs cannot justify an otherwise invidious classification. *Shapiro* v. *Thompson,* 394 U.S. 618, 633 (1969), *Graham v. Richardson,* 403 U.S. 365, 374-75 (1971).

[40] *Harris v. McRae,* 100 S. Ct. 2671, 2688 n.19 (1980) (abortion funding); *Dandridge v. Williams,* 397 U.S. 471 (1970) (upper limit on total amount paid to family under AFDC program does not violate equal protection clause). *See also General Electric Co. v. Gilbert,* 429 U.S. 125 (1976) (employer exclusion of pregnancy benefits for employer disability plan consistent with Title VII of Civil Rights Act).

many mentally ill individuals are likely to benefit to a much greater extent from the improvement in self-esteem which SSI inpatient benefits payments can sometimes afford. These needs of the mentally ill are not now and were not in 1972 satisfied by state and local governments to the same extent as the SSI program makes possible for others. Depriving mentally ill persons specially of this benefit does not rest upon any ground of difference fairly or substantially related to providing the indigent ill some small amount of money for discretionary purposes. They have been denied equal protection on the basis of a classification which is an archaic and overbroad generalization.

B. The classification does not serve an important governmental interest.

That this classification does not achieve an important governmental objective of saving money has already been argued.[41] However, Appellant also advances the proposition that the exclusion of the institutionalized mentally ill from the SSI program serves some interest of federalism by leaving their treatment to the states. (Appellant's Brief at 29-31.) This proposition is without merit. The federal government involves itself in the treatment of mentally ill inpatients when they are 65 or over, under 21, and when their treatment is provided in a non-psychiatric institution.[42] It involves itself in the treatment of the mentally ill for all manner of outpatient services.[43] In fact, the only significant category of services with which the government does not involve itself relates to persons aged 21-65 in institutions for the mentally ill, known in a darker age as insane asylums. The individuals who are denied benefits are no

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[41] *Supra*, at 26-27.

[42] 42 U.S.C. §1396d(a) (14), (16), and (17)(B)(1976 & Supp. II).

[43] 42 U.S.C. §1396d(a) (2), (3), (4)(B), (5), (6), (7), (8), (9), (12), (13), and 17(B) (1976 & Supp. II 1978).

different from others whose care is financed in whole or in part by the federal government; nor are the benefits denied different from those financed in other types of public and private institutions. Thus, it is clear that the treatment of the mentally ill has not been left to the states, but has been a significant area of federal involvement. More importantly, the SSI inpatient benefits here in question have nothing to do with the treatment of the mentally ill, as they are provided for purposes other than treatment.

In short, by this classification no interest of federal-state comity is preserved, no intrusion upon state sovereignty is avoided, and no usurpation of state responsibility is prevented. This classification barely serves any governmental interest, much less achieves an important governmental objective. In its effect, it is an insane asylum exclusion, pure if not simple, having no proper place in an enlightened society.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment and opinion of the court below.

Respectfully submitted,

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